149 U 860

RECORD, CASE No. 15,254.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

Term No., 1284.

GEORGE E. WILSON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED FEBRUARY 7, 1893.

RECORD, CASE No. 15,254.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

Term No., 1284.

GEORGE E. WILSON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Indictment	2	1
Bench warrant	6	3
Order overruling motion to quash	7	4
Order for subpœna to J. B. Patterson	8	4
Trial commenced	8	5
Trial concluded	9	5
Verdict	9	5
Order overruling motion for new trial	3	5
Judgment and sentence	10	6
Bill of exceptions	11	6
Motion to quash	11	6
Testimony of Robert McAfee	13	7
Brice McGheon	15	8
Ida Wilson	15	8
Miss Markland	19	10
Robert B. McAfee (recalled)	20	10

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 18, 1893.

	Original.	Print.
Notice to produce letters	20	11
Letter, John Hobart to G. E. Wilson, December 27, 1891	22	11
Letter, John Hobart to G. E. Wilson & Co., January 5, 1892	23	12
Letter, Jack Horner to G. E. Wilson, April 23, 1892	24	13
Testimony of Fred. C. Voss	26	13
Maurice D. Seavey	26	14
Andrew Irle	27	14
Circulars or order blanks of G. E. Wilson & Co.	29	15
Books offered	37	20
Testimony of Robert McAfee (recalled)	38	20
Extracts from address of United States attorney	39	21
Defendant's requests	40	21
Judge's certificate	40	21
Assignment of errors	41	22
Petition for writ of error	51	27
Allowance of writ of error	52	28
Order allowing writ of error	53	28
Bond	53	28
Order as to bill of exceptions, &c.	55	30
Clerk's certificate	56	30
Writ of error	57	30
Citation and proof of service of same	58	31

1 Pleas in the district court of the United States for the northern district of Illinois, northern division, held at the United States court-room, in the city of Chicago, in the district aforesaid, before Hon. Romanzo Bunn, district judge for the western district of Wisconsin, on Wednesday, the thirtieth day of November, in the year of our Lord one thousand eight hundred and ninety-two, in the October adjourned term, 1892, of said court, and of our Independence the one hundred and seventeenth year.

S. W. BURNHAM, *Clerk.*

UNITED STATES OF AMERICA
vs.
GEORGE E. WILSON. } 1943. Indictment.

Be it remembered that on the eighth day of October, 1892, the grand jury of the United States, empaneled and sworn in and for the adjourned October term of the district court of the United States for the northern district of Illinois, northern division, came into said court at Chicago, in said district, and presented in open court an indictment, signed by their foreman, as a true bill against George E. Wilson, defendant; which said indictment is in the words and figures following, to wit:

2 *Indictment.*

In the District Court of the United States of America for the Northern District of Illinois, Northern Division, of the October Adjourned Term, in the Year of Our Lord Eighteen Hundred and Ninety-two.

NORTHERN DISTRICT OF ILLINOIS,
Northern Division, } *sct:*

1. The grand jurors for the United States of America, inquiring for the northern division of the northern district of Illinois, upon their oath present that George E. Wilson, late of the city of Chicago, in the said division and district, on the twenty-fifth day of April, in the year of our Lord eighteen hundred and ninety-two, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post office of the said United States at Chicago aforesaid, for mailing and delivery, a letter and circular giving information where, how, of whom, and by what means a certain obscene, lewd, and lascivious book and publication of an indecent character entitled "Stolen Sweets" might be obtained, which said letter and circular was then and there directed to one "Jack Horner, Collinsville, Ill., care Vandalia line," against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

3 2. And the grand jurors aforesaid upon their oath aforesaid do further present that the said George E. Wilson, on the t-enty-fifth day of April, in the year of our Lord eighteen hundred and ninety-two, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post office of the said United States at Chicago aforesaid, for mailing and delivery, a certain other letter and circular giving information where, how, of whom, and by what means a certain obscene, lewd, and lascivious book and publication of an indecent character entitled "Mysteries of the Court of London" might be obtained, which said letter and circular was then and there directed to one Jack Horner, Collinsville, Ill., care Vandalia line, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

3. And the grand jurors aforesaid upon their oath aforesaid do further present that the said George E. Wilson, on the third day of January, in the year of our Lord eighteen hundred and ninety-two, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post office of the said United States at Chicago aforesaid, for mailing and delivery, a certain other letter and circular giving information where, how, of whom, and by what means a certain obscene, lewd, and lascivious book and publication of an indecent character entitled "Stolen Sweets" might be obtained, which said letter and circular was then and there directed to one "John Hobart, O'Fallon, Ill.," against the peace and dignity of the said United States
4 and contrary to the form of the statute of the same in such case made and provided.

4. And the grand jurors aforesaid upon their oath aforesaid do further present that the said George E. Wilson, on the third day of January, in the year of our Lord eighteen hundred and ninety-two, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post office of the said United States at Chicago aforesaid, for mailing and delivery, a certain other letter and circular giving information where, how, of whom, and by what means a certain obscene, lewd, and lascivious book and publication of an indecent character entitled "Bel Ami" might be obtained, which said letter and circular was then and there directed to one "John Hobart, O'Fallon, Ill.," against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

5. And the grand jurors aforesaid upon their oath aforesaid do further present that the said George E. Wilson, on the third day of January, in the year of our Lord eighteen hundred and ninety-two, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post office of the said United States at Chicago aforesaid, for mailing and delivery, a certain other letter and circular giving information where, how, of whom, and by what means a certain obscene, lewd, and lascivious book and publication of an indecent character entitled

"Mademoiselle de Maupin" might be obtained, which said letter and circular was then and there directed to one "John
5 Hobart, O'Fallon, Ill.," against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

6. And the grand jurors aforesaid upon their oath aforesaid do further present that the said George E. Wilson, on the third day of January, in the year of our Lord eighteen hundred and ninety-two, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post office of the said United States at Chicago aforesaid, for mailing and delivery, a certain other letter and circular giving information where, how, of whom, and by what means a certain obscene, lewd, and lascivious book and publication of an indecent character entitled "Mysteries of the Court of London" might be obtained, which said letter and circular was then and there directed to one "John Hobart, O'Fallon, Ill.," against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

THOMAS E. MILCHRIST,
United States Attorney.

(Endorsed:) Indictment. Sec. 3893 as amended. A true bill. Geo. R. Shaw, foreman. Bail, $1,000. H. W. Blodgett, district judge. Thomas E. Milchrist, U. S. att'y, N. dist. Ills. Filed Oct. 8, 1892. S. W. Burnham, clerk.

6 Afterwards, to wit, on the twelfth day of November, A. D. 1892, a bench warrant issued out of the clerk's office of said court; which said bench warrant, together with the marshal's return thereon endorsed, is in the words and figures following, to wit:

Bench Warrant.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

District Court of the United States of America.

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to take George E. Wilson, if he shall be found in your district, and him safely keep, so that you have his body before our judge of our district court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, forthwith to answer unto the United States of America in an indictment pending in said court against said George E. Wilson.

And have you then and there this writ with your return thereon.

Witness the Hon. Henry W. Blodgett, judge of the dis-
[SEAL.] trict court of the United States of America, at Chicago aforesaid, this 12th day of November, in the year of our

Lord one thousand eight hundred and 92, and of our Independence the 117th year.

S. W. BURNHAM, *Clerk.*

Marshal's Return.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

7 I served this writ by arresting the within-named defendant, Geo. E. Wilson, and producing his body in court as directed this 26th day of November, 1892, whereupon he was discharged on bail for appearance on Monday, Nov. 28, '92.

FRANK HITCHCOCK,
U. S. Marshal,
By GEO. Q. ALLEN, *Dep'y.*

Fees.

1 service	$2 00
1 mile	06
2 miles	20
1 discharge on bail	50
	$2 76

(Endorsed:) Filed Nov. 28, 1892. S. W. Burnham, clerk.

Afterwards, to wit, on the twenty-eighth day of November, 1892, in the October adjourned term, 1892, of said court, in the record of proceedings in said entitled cause before Hon. Romanzo Bunn, district judge for the western district of Wisconsin, appears the following entry, to wit:

UNITED STATES
vs.
GEORGE E. WILSON.

Now comes the district attorney and comes defendant, and by his attorney moves the court to quash each and every count of the indictment filed herein, and the court, having heard the arguments of counsel, upon said motion, overrules the same; to which the defendant, by his counsel, then and there excepted.

8 Afterwards, to wit, on the thirtieth day of November, in the October adjourned term, 1892, of said court, in the record of proceedings of said court in said entitled cause before Hon. Romanzo Bunn, judge, appears the following entries, to wit:

THE UNITED STATES
vs.
GEO. E. WILSON.

On motion of the defendant, by his attorney, it is ordered that a subpœna issue for the attendance of J. B. Patterson.

UNITED STATES
vs.
GEORGE E. WILSON.

Comes the district attorney and comes the defendant in person and by his attorney, and said defendant, being now arraigned upon the indictment filed herein against him, for plea thereto says he is not guilty in manner and form as therein charged; and upon issue joined upon said plea comes a jury of good and lawful men, to wit, W. S. McDowell, L. P. Sucher, Earl E. Sargeant, Dan'l White, R. Wagner, Wm. B. Lewen, Wm. Dwely, A. C. Shepardson, R. Spotswood, Jr., Hugh Megran, S. W. Fish, N. J. Adams, and after hearing the evidence the further trial of this cause is postponed until to-morrow morning.

9 Afterwards, to wit, on the first day of December, in the October adjourned —, 1892, of said court, in the record of proceedings of said court in said entitled cause before Hon. Romanzo Bunn, judge, appears the following entry, to wit:

UNITED STATES
vs.
GEO. E. WILSON.

Comes district attorney and comes the defendant, and also comes again the jury, and after hearing the arguments and instructions the jury retire with leave to seal their verdict.

Afterwards, to wit, on the second day of December, in the October adjourned term, 1892, of said court, in the record of proceedings of said court in said entitled cause before Hon. Romanzo Bunn, judge, appears the following entry, to wit:

UNITED STATES
vs.
GEO. E. WILSON.

Comes the district attorney and comes the defendant in person and by his attorney and the jury returned their sealed verdict, wherein they say, We, the jury, find the defendant guilty.

Whereupon the defendant moves the court for new trial herein; which motion is heard and overruled; to which ruling the defendant excepts.

10 And, on motion for sentence and judgment, the court sentences said defendant to be imprisoned in the penitentiary of the State of Illinois, at Joliet, for the period of two years at hard labor.

Whereupon it is considered and adjudged by the court that said defendant be imprisioned in the penitentiary of the State of Illinois, at Joliet, for the term and period of two years at hard labor.

11 On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record; which said exceptions are in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the District Court Thereof, November Term, 1892.

THE UNITED STATES
vs.
GEORGE E. WILSON.

Be it remembered that heretofore, to wit, on the 28th day of November, A. D. 1892, the said defendant, by his counsel, filed in said court a certain motion and points in writing to quash the indictment herein and each count thereof; which motion is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the District Court Thereof.

THE UNITED STATES
vs.
GEORGE E. WILSON. } Indictment.

And now comes the said defendant and moves the court here to quash the indictment in said above-entitled cause, and assigns here the following reasons in support of his said motion:

12 First. Each count of said indictment is double in charging the mailing of a letter and of a circular.

Second. Each count of said indictment fails to charge the defendant with knowledge that the book advertised was or is obscene.

Third. Each count of said indictment fails to set out any sufficient description of the letter or circular deposited in the mail or furnish any reason for such failure.

Fourth. No count in said indictment fully charges any crime against the United States.

C. STUART BEATTIE,
For Defendant.

And thereupon the said motion to quash the indictment herein upon the said written motion of the defendant came on to be heard; the court, being fully advised, did overrule the same and each part thereof; to the overruling of which said motion and each of the points thereof the defendants, by his counsel, then and there duly excepted.

Be it further remembered that afterwards, to wit, on the 30th day of November, 1892, said cause came on to be heard before the court

and jury, the United States appearing by the district attorney and assistant district attorney and the defendant by Mr. Theodore G. Case and Mr. C. Stuart Beattie and in person, and the United States, to maintain the issues on its part, introduced the following evidence, to wit:

13 ROBERT MCAFEE, being duly sworn on behalf of the Government, testified:

I am a United States post-office inspector. I have seen the defendant; have had no conversation with him; I wrote him, by reason of advertisements which I had seen, about December 29, 1891. I enclosed the letter in an envelope and forwarded it to the superintendent of free delivery at Chicago for special delivery to defendant. The envelope was postmarked O'Fallon, Illinois. I received a reply to that letter forwarded to me from O'Fallon to St. Louis, under official cover, by the postmaster at O'Fallon. These circulars were in the envelope when received. The stamp of the Chicago post office is on the envelope, dated "January 3, 1892, 2.30 p. m." McGheon was the postmaster at O'Fallon. I thereupon sent an order for books to George E. Wilson in a letter. I received the books ordered. They were sent to O'Fallon by express and forwarded from there here (Chicago) to me by the postmaster. These are the books which I received in this package, addressed to "John Hobart, O'Fallon, Illinois," written on a card on wrapper, reciting "Printed matter. G. E. Wilson, publisher, 415 & 417 Dearborn street." This (referring to envelope addressed to Jack Horner) came in reply to my letter. I got this (showing Jack Horner's envelope) at home, at Collinsville, Ills. (producing envelope and circulars), some time after the 25th of April, 1892.

Q. Now, did you receive this (referring to Jack Horner's
14 letter) as the reply to your letter?

(Objected to as calling for a conclusion. Objection overruled. Exception by defendant.)

A. Yes, sir; it must have been in response to my letter. It contained these circulars and blanks, nothing but printed matter; the post-office stamp is April 25, 9.30 p. m., 1892; it is the stamp of the Chicago post office; I received it from the postmaster at Collinsville; I gave the letter I received at Collinsville to Mr. Irle; he is a clerk in the post office.

Cross-examination:

I wrote three letters; I did not say I was in the employ of the Government; I am in the employ of the Western Society for the Suppression of Vice; its president is W. J. Breeze, of Cincinnati, Ohio; it is carrying on the same line of work as is the society of which Anthony Comstock is president; I draw my salary from the society; its headquarters are at Cincinnati, St. Louis, and Chicago; I have been in their employ about sixteen years; my residence has been at Collinsville, Illinois; I have no personal acquaintance with

Mr. Wilson; I received no letter from him before I wrote to him; I don't know that Wilson got the letter I wrote to him; I am paid witness fees in these cases, and I hold a commission from the Government.

15 BRICE MCGHEON, called and sworn as a witness on behalf of the United States, testified:

I am postmaster at O'Fallon, Illinois, since the 5th of August, 1889. I know the witness McAfee. The envelope shown me passed through my post office about the 4th of January, as shown by the mark. I forwarded the letter to McAfee at St. Louis. The letter is directed "John Hobart, O'Fallon, Illinois." It has a picture here on corner of envelope, and says, "Return in ten days to G. E. Wilson & Co., publishers and book dealers, 415 & 417 Dearborn street." I received the postal card shown me at the O'Fallon post office (a notice from express company of receipt of package for John Hobart), and I took this package shown me out of the O'Fallon express office. I forwarded it to Mr. McAfee at Chicago. The package was received on the 11th of January, 1892. The letter directed to John Hobart at O'Fallon, Illinois, was received about the 4th of January, 1892. I received the express package in the morning and forwarded it to Chicago in the evening. It was sent by mail under official cover. I did not open the package. The letter addressed to John Hobart, O'Fallon, Illinois, was forwarded to McAfee under official cover just as I received it, unopened.

IDA WILSON, called and sworn on behalf of the United States, testified:

I know the defendant. His place of business is 312 State
16 street; he has been there since February last. In January, 1892, he was at 417 Dearborn street. I work for him. He was at 415 and 417 Dearborn street about a year. His business was a book publisher. I worked there for him as a clerk. I helped in the retail department and I did help in the wholesale department. Miss Markland worked there. Mr. Howard worked in the Dearborn-street store and Miss Markland in the State-street store. Defendant was running both stores. Mr. Howard received a good deal of the mail. He was book-keeper and worked for Wilson. I don't think he had worked there a year. I could not say that he was working there last January. He is not there now. I cannot say when he left. I cannot give the exact date. He was up there last April, and I could not give the time he left. I do not know the month.

Q. Whose writing is this (producing envelope addressed to John Hobart)?

A. It looks very much like my writing.

Q. Look at that, will you (producing another envelope addressed to Jack Horner)?

A. These are two different writings.

Q. In whose writing did you say this is (referring to Horner envelope)?

A. I could not say positively about this writing, because I don't

know. The address on the first envelope shown me is in my handwriting; the other handwriting I don't know. At the time I addressed the letter I was working for Mr. Wilson, in his employ as a clerk. The writing is on one of his envelopes.

17 Q. Did you ever see one of those circulars (referring to circulars identified by McAfee as in the Horner and Hobart envelopes at his place)?

(Objected to by defendant as incompetent. Objection overruled. Exception by defendant.)

A. It looks very much like it.

Q. All of them? I want you to look at all of them. You saw circulars like that down there—all those circulars—at his place while you were working there. Is that right?

A. Yes, sir.

Q. Why did you put that address on there, "John Hobart, O'Fallon, Illinois"?

(Objected to by defendant as incompetent. Objection overruled. Exception taken by defendant.)

A. To send the letter out.

Q. It was sent out in due course of mail, was it not?

A. I did not look.

Q. So it went out in the mail, did it?

A. Yes; I did not say I put the circulars in the envelope. I directed the envelope, but I do not know anything further. I remember nothing about directing the envelope. I received the mail frequently and answered it.

Q. And did that for Mr. Wilson?

A. Yes, sir.

Q. And you addressed this letter for Mr. Wilson as his agent, did you?

A. I directed it. I don't know that he said so.

18 Q. But that was a part of your business there—to send out these notices, was it?

A. Yes, sir.

Q. Now, I want to ask you this question. Is this true that you were in the habit, while you were working down there, of sending out circulars like this through the mail?

(Objected to as immaterial and incompetent. Objection overruled. Exception taken by defendant.)

A. I did not send anything through the mail; I directed the envelopes; I worked on the books; I received mail and generally laid it aside; I don't know who opened it; I suppose Wilson opened part of it; he was not there all the time.

Q. Will you tell me, if the court says it is proper to answer, whether or not you sent out any answers to the mail you received?

(Objected to as immaterial and incompetent. Objection overruled. Exception taken by defendant.)

A. I answered some letters.

Q. Under whose direction did you answer them?

(Objected to by defendant as immaterial and incompetent.) (Objection overruled. Exception taken by defendant.)

A. (No answer.)
Q. How did you come to answer these letters—was it because it was part of your duties there?

(Objected to by counsel for defendant as leading. Objection overruled. Exception by defendant.)

A. (No answer.)
Q. Will you answer? You understand the question, do you?
19 A. I have answered some of the letters.
Q. And sent out some of these circulars. Now, the question I ask you is why did you do it. Was it because it was part of your duties there?
A. Circulars are not letters.
Q. It was part of your duty to write letters, was it?

(Objected to by counsel for defendant as leading and incompetent. Objection overruled. Exception taken by defendant.)

A. It was not specified.
Q. You did do it, did you not?
A. I answered letters.
Q. And you did it with Mr. Wilson's knowledge, didn't you?
A. I did not ask him.

Cross-examination:

I am the sister of the defendant.

Miss MARKLAND, sworn as a witness on behalf of the United States, testified as follows:

I reside on State and Harrison streets; I know the defendant Wilson; I am clerk for him; have been in his employ for four years or more in both his stores; in January, 1892, I was employed
20 by him at 417 State street; I don't know who received the mail; I never received it; it was not delivered to any particular one; I don't know whose handwriting the address on the envelope shown me is in.

ROBERT B. MCAFEE recalled:

This is a copy of the letter I wrote to defendant on December 28th, the first letter I testified about on the stand; this is a true copy, dated the 27th of December, 1891; it was put in an envelope.

The assistant district attorney read in evidence the following notice, which it was agreed by all parties had been first served upon

the defendant or his counsel two hours before so being offered in evidence:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

THE UNITED STATES
vs.
GEORGE E. WILSON. } No. 1943. Criminal.

To the above-named defendant or his attorneys:

You will produce in court to be used upon the trial of the above-entitled cause certain letters as follows:

1st. One directed to G. E. Wilson, publisher, 415 Dearborn St., Chicago, Ill., signed in the name of John Hobart, dated December 27, 1891, delivered December 29, A. D. 1891.

21 2nd. One letter, dated January, 1892, signed in the name of John Hobart, from O'Fallon, Illinois, and directed to G. E. Wilson & Co., 415 Dearborn St., Chicago, Illinois, enclosing therein $2 and ordering certain books entitled "Mysteries of the Court of London," "Bel-Ami," "Mademoiselle de Maupin," and "Stolen Sweets."

3rd. A letter, signed in the name of Jack Horner, dated April 23rd, A. D. 1892, sent from Collinsville, Illinois, and directed to G. E. Wilson, 314 State street, Chicago, Illinois, and in which letter the sender asked for lists of publications.

(Signed) THOMAS E. MILCHRIST,
United States Attorney.

I have served a notice on the defendant, of which the foregoing is a true copy, by delivering the same to Mr. Beattie, one of the defendant's attorneys, in open court, at one o'clock p. m. this 30th day of November, A. D. 1892.

THOMAS E. MILCHRIST,
U. S. Attorney.

Thereupon the court offered to delay the admission of secondary evidence of the instruments mentioned in the said notice until 10 o'clock next morning if the defendant would produce the originals at that time. Thereupon counsel for the defendant said that the defendant had no recollection of having received the letters. Thereupon the district attorney offered in evidence said letter in the words and figures following, to wit:

22 O'FALLON, ILLINOIS, *December* 27, 1891.

G. E. Wilson, publisher, 315 Dearborn street, Chicago, Illinois.

DEAR SIR: Please send me list of your publications suitable for private reading.

Yours truly, JOHN HOBART, *W. U. T. C.*

To the admission of which letter in evidence the defendant objected for the reasons that they had not had sufficient time after the service of the notice to make search for the original; that the notice was informal and insufficient in failing to inform the defendant that secondary evidence of the said letter would be offered in evidence, and that there was no evidence that said original letter had ever come into the custody of the defendant or was then in the custody of the defendants. The court then and there overruled the said objection, and the defendant then and ther- excepted, and said letter was read in evidence to the jury.

WITNESS: "This is a copy of a letter which I wrote to defendant after receiving those circulars. It was addressed to G. E. Wilson & Co., 415 Dearborn street, Chicago, and two dollars enclosed in the envelope."

The district attorney thereupon offered in evidence said letter in the words and figures following, to wit:

23 O'FALLON, ILLINOIS, *January* 5, 1892.

G. E. Wilson & Co., 415 Dearborn street, Chicago, Illinois:

GENTLEMEN: Thanks for list of books just received. I send you $2 for the following: "Mysteries of the Court of London," "Bel-Ami," "Madamoiselle De Maupin," and "Stolen Sweets." I will undoubtedly want many on your list, and if you can allow me anything in discount you will oblige

Yours truly, JOHN HOBART.

And thereupon counsel for defendant objected to the admission of the said last-mentioned instrument in evidence for the reason that the notice to produce did not give sufficient time to make search for the original, and that the said notice was insufficient and informal in not informing defendant that secondary evidence would be offered, and that there was not sufficient evidence that the original letter had ever been in the possession of the defendant or was then in his possession.

The court overruled the said objection- and each thereof; to which the defendant then and there excepted, and said instrument was read in evidence to the jury.

(Witness continuing:) This is a copy of a letter I sent to Wilson April 23, 1892, of that date. It was addressed to G. E. Wil-
24 son, 314 State street, Chicago, Illinois, enclosed in an envelope postmarked Collinsville, Illinois. I gave it to the carrier to deliver to Mr. Wilson.

And thereupon the district attorney offered in evidence said instrument in writing in the words and figures following, to wit:

"COLLINSVILLE, ILLS., 4, 23, '92.

G. E. Wilson, Esq., 314 State street, Chicago, Ills.

DEAR SIR: Some time since I received some books from you. Will thank you to send me list of your new books. Address

JACK HORNER,
C. O. the Vandalia Line.

And thereupon counsel for the defendant objected to the admission of the said last-mentioned instrument in evidence for the reason that the notice to produce did not give sufficient time to make search for the original, and that the said notice was insufficient and informal in not informing defendant that secondary evidence would be offered, and that there was not sufficient evidence that the original letter had ever been in the possession of the defendant or was then in his possession. The court overruled the said objection- and each thereof; to which the defendant then and there excepted, and the said instrument was read in evidence to the jury.

(Witness continuing:) In reply I received this list of books which I afterwards gave to Mr. Irle.

25 Cross-examined:

Jack Horner and John Hobart are both assumed names. I did not mail the letter at O'Fallon; it was postmarked there; both of the O'Fallon letters went through the mail from St. Louis to this city under official cover, directed to the superintendent of free delivery, to be placed in the hands of the carrier; the stamp was put on the envelopes at O'Fallon. I sent blank envelopes to the postmaster at O'Fallon to be postmarked under official cover—a dozen of them. I do business that way by the thousand; send blank envelopes to the postmaster and he puts the stamp on them at my request; then I enclosed these letters dated December 27, 1891, and January 5, 1892, in these envelopes directed to Wilson, and sealed the envelopes and put it inside of another envelope and addressed the letter to McGrath, superintendent of delivery at Chicago. I went to the post office at Collinsville and had the Collinsville envelope stamped and brought it to Chicago and gave it to the carrier for delivery after I had put the letter in it and sealed it; possibly the dates were left blank on the O'Fallon envelopes and I supplied the dates. I can have letters marked in this way at every post office I desire to; in this I have the co-operation of the postmasters; I have full power to do everything needed to be done in the investigation of these cases.

26 FRED. C. VOSS, a witness called and sworn on behalf of the United States, testified: I am a letter-carrier of the Chicago post office; have been a letter-carrier 6 or 7 years. I know the defendant Wilson and his place of business, 312 State street; it is on my route, and I have delivered mail there as often as four times a day for several years. I have seen Wilson there occasionally; have

generally found Miss Ida Wilson there. About the 25th of April, 1892, I delivered a letter postmarked "Collinsville, Illinois," addressed to G. E. Wilson, 314 State street, Chicago, to Miss Ida Wilson between 12 and 1 o'clock. I received the letter from Mr. Householder, the superintendent. I had delivered Wilson's mail to Miss Ida Wilson before. I made a memorandum of the delivery of this letter.

Cross-examined:

Mr. Householder, the superintendent, gave me the letter at my case down-stairs in the carriers' room. I took the letter from his hands and put it in my bag and walked out.

MAURICE D. SEAVEY, called and sworn as a witness on behalf of the United States, testified:

I have been a letter-carrier in the Chicago post office for
27 ten years. I know the defendant Wilson. I delivered the letter at his place on the 29th of December, 1891, postmarked O'Fallon, Illinois, and addressed to G. E. Wilson, publisher, 415 Dearborn street. I made a memorandum of it. I delivered it to Miss Ida Wilson. I deliver mail there regularly; it was sometimes received by Mr. Wilson, sometimes by Miss Wilson, sometimes by Miss Markland. I got this letter from the superintendent of carriers, Mr. Householder. I delivered another letter on January 7th at 1.30 p. m. postmarked O'Fallon, Illinois, and addressed to G. E. Wilson & Co., and made a memorandum within five minutes thereafter; it was delivered to Miss Markland. I have delivered mail to Miss Wilson.

Cross-examination:

These letters were handed to me by the superintendent of carriers in Chicago.

ANDREW IRLE, a witness called and sworn on behalf of the United States, testified:

I am connected with the Chicago post office as clerk. I know McAfee; know the defendant. I was in his place of business on the 4th of May last about six o'clock. I saw Miss Ida Wilson. Defendant was there, in the rear of the store at a desk. I had these circulars and the Jack Horner envelope which enclosed them originally in my pocket. Miss Wilson came to wait on me. I
28 held the envelope and circulars so that she could see them, and she took them. I ordered some books that I had marked in those circulars. I got the envelope and circulars from McAfee. I bought two books, one copy of "Stolen Sweets" and one copy of "Mysteries of the Court of London." These are the books. (Books shown to witness.) I gave Miss Wilson a silver dollar. She went back to where Wilson was sitting. I went back a little so I could see, and I saw she was talking to Wilson; then she brought the

books back and gave me fifty cents in change. The original price of the books is fifty cents each. I got them at wholesale rates. I did not hear what she said to him. She had the envelope and circulars in her hand at the time.

Thereupon counsel for defendant moved to strike out all of the testimony of the last witness for the reason that the same was immaterial and incompetent. The court said, "No; I think not; it merely bears on Wilson's connection with this thing. He is not charged with the sale of the books, and he would not be liable for that under the act of Congress. There is no law of Congress against the sale of the books, but it all bears upon his sending out these circulars, and shows the whole business carried through the mails." To which the defendant then and there excepted.

Thereupon the defendant moved to strike out all the testimony of the witness McAfee relating to the pretended copies of the said several letters which it was claimed the defendant had received from McAfee; and thereupon the court said, "No; I think he directed them to the defendant, Wilson, but enclosed them in another
29 envelope directed to the superintendent of mails. The evidence of the last witnesses show they were delivered to the defendant, as directed by McAfee." To which the defendant then and there duly excepted.

Thereupon the district attorney offered in evidence certain envelope bearing the letters and marks as follows, to wit: Postmarked Chicago, Ills., Jan. 3, 2.30 p. m., 1892, with a two-cent cancelled stamp, bearing a card, "Return in ten days to G. E. Wilson & Co., publishers and book dealers, 415 and 417 Dearborn street, Chicago." (Addressed:) "John Hobart, O'Fallon, Illinois." Stamped on the back, post-office stamp, "O'Fallon, Ills., Jan. 4, 1892, received," and two certain circulars, identified by the witness McAfee as having been received in said envelope, in the words and figures following, to wit:

Notice.—Books marked # not mailable at second-class rates.

Order Blank.

——, 1892.

G. E. Wilson & Co., booksellers & publishers, 312 State street, Chicago.

Please send by ——

—— copies # Mysteries of the Court of London, by George W. M. Reynolds ..... $ 50

—— copies # Rose Foster (part II of the Mysteries of the Court of London), by George W. M. Reynolds..... 50

—— copies # Caroline Walters (part III of the Mysteries of the Court of London), by George W. M. Reynolds.. 50

30 —— copies # Pauline Clarendon (part IV of the Mysteries of the Court of London), by George W. M. Reynolds..... 50

—— copies # Venetia Trelawney (part I of the second series of the Mysteries of the Court of London), by George W. M. Reynolds ..... $ 50
—— copies # Louisa Stanley (part II of the second series of the Mysteries of the Court of London), by George W. M. Reynolds 50
—— copies # Caroline of Brunswick (part III of the second series of the Mysteries of the Court of London), by George W. M. Reynolds 50
—— copies # Ariadne Varian (part IV of the second series of the Mysteries of the Court of London), by George W. M. Reynolds 50
—— copies # Droll Stories, by Honore de Balzac 50
—— " " " cloth 1 25
—— " # The Heptameron of Margaret de Navarre 50
—— " " " 1 25
—— " Mademoiselle Giraud, My Wife, by Adolph Belot 50
—— " Bel Ami, by Guy de Maupassant 50
—— " The Woman of Fire, by Adolph Belot 50
—— " Mademoiselle de Maupin, by Gautier 50
—— " The Shadow of Shame, by Austyn Granville 50
—— " Viola Fairfield's Secret, by L. J. Leah 50
—— " Fortunio, by Gautier 25
—— " Money, by Emile Zola 25
—— copies The Fortune of the Rougons, by Emile Zola 25
31 —— " Sappho, by Alphonse Daudet 25
—— " Son of Clemenceau, by Alexandre Dumas, fils 25
—— copies Clemenceau Case, by Alexandre Dumas, fils 25
—— " # Kreutzer Sonata, by Leo Tolstoi 25

Name: —— ——.
Town: ——.
State: ——.

Order Blank of G. E. Wilson's Publications.

312 State street, Chicago, Illinois.

GENTLEMEN: Please send by ——

Books in cloth.

—— Decameron of Boccaccio $1 50
—— Paine's Theological Works 1 00
—— Paine's Political Works 1 00
—— Ingersolia: Gems of Thought, by R. G. Ingersoll 1 00
—— Col. R. G. Ingersoll's 44 Lectures 1 00
—— Bank and Train Robbers of the West 1 00
—— The Age of Reason, by Thomas Paine 50
—— The Rights of Man, by Thomas Paine 50

Books in paper covers.

These books have five half-tone illustrations, with elegant covers, equal to, and in many case--better than, books sold at 50 cents.

32 Wilson's Library of Fiction.

Mailable at one cent per pound.

—— A Love Crime, by Paul Bourget ..... $ 25
—— Shifting Love, by George Moore 25
—— A Marriage in High Life, by Octave Feuillet 25
—— Life, Character, and Daring Exploits of the Younger Brothers 25
—— The Red Lottery Ticket, by F. Du Boisgobey 25
—— In the Arms of Love, by Abi S. Jackman 25
—— The Age of Reason, by Thomas Paine 25
—— The Rights of Man, by Thomas Paine 25
—— Life of Frank and Jesse James 25
—— Ingersolia: Gems of Thought, by R. G. Ingersoll 50
—— Prince of Mull: A Glimpse of Royal Life 50
—— Silent Bliss, by Washington Davis 50

Miscellaneous books in paper covers.

Not mailable.

—— The Decameron of Boccaccio 50
—— The Book of Nature, by Dr. Faulkner 50
—— Stolen Sweets, by W. W. Knott 50
—— Serpent Sin 50
—— Rube Burrows 25
—— Fruits of Philosophy, by Annie Besant 25
—— The Law of Population, by Annie Besant 25
—— Volney's Ruins, by Volney 25
—— Life of a Wild Bull, by Buel 25

Name: —— ——.
Town: ——.
State: ——.

33 And a certain other envelope bearing the same return card as the preceding, with the stamp of the Chicago post-office, "April 25th, 9.30 p. m., 1892," with a two-cent stamp, addressed "Jack Horner, Collinsville, Illinois, c. o. Vandalia line."

And two certain other circulars identified by the witness McAfee as having been received in the envelope last aforesaid; which circulars are in the words and figures following, to wit:

Notice.—Books marked # not mailable at second-class rates.

Order Blank.

——, 1892.

G. E. Wilson & Co., booksellers & publishers, 312 State street, Chicago.

Please send by mail——

——	copies # Mysteries of the Court of London, by George W. M. Reynolds	$ 50
——	copies # Rose Foster (part II of the Mysteries of the Court of London), by George W. M. Reynolds	50
——	copies # Caroline Walters (part III of the Mysteries of the Court of London), by George W. M. Reynolds	50
——	copies # Pauline Clarendon (part IV of the Mysteries of the Court of London), by George W. M. Reynolds	50
——	copies # Venetia Trelawney (part I of the second series of the Mysteries of the Court of London), by George W. M. Reynolds	50
34 ——	copies # Louisa Stanley (part II of the second series of the Mysteries of the Court of London), by George W. M. Reynolds	50
——	copies # Caroline of Brunswick (part III of the second series of the Mysteries of the Court of London), by George W. M. Reynolds	50
——	copies # Ariadne Varian (part IV of the second series of the Mysteries of the Court of London), by George W. M. Reynolds	50
——	copies # Droll Stories, by Honore de Balzac	50
——	" " " " cloth	1 25
——	" # The Heptameron of Margaret of Navarre	50
——	" " " " "	1 25
——	" Madamoiselle Giraud, My Wife, by Adolph Belot	50
——	" Bel Ami, by Guy de Maupassant	50
——	" The Woman of Fire, by Adolph Belot	50
——	" Madamoiselle de Maupin, by Gautier	50
——	" The Shadow of Shame, by Austyn Granville	50
——	" Viola Fairfield's Secret, by L. J. Leah	25
——	" Fortunio, by Gautier	25
——	" Money, by Emile Zola	25
——	" The Fortune of the Rougons, by Emile Zola	25
——	" Sappho, by Alphonse Daudet	25
——	" Son of Clemenceau, by Alexandre Dumas, fils	25
——	" Clemenceau Case, by Alexandre Dumas, fils	25
——	" # Kreutzer Sonata, by Leo Tolstoi	25

Name: —— ——.
Town: ——.
State: ——.

35 *Order Blank of G. E. Wilson's Publications.*

312 State street, Chicago, Illinois.

GENTLEMEN: Please send by ——

Books in cloth.

——	Decameron of Boccaccio	$1 50
——	Paine's Theological Works	1 00
——	Paine's Political Works	1 00
——	Ingersolia: Gems of Thought, by R. G. Ingersoll	1 00
——	Col. R. G. Ingersoll's 44 Lectures	1 00
——	Bank and Train Robbers of the West	1 00
——	The Age of Reason, by Thomas Paine	50
——	The Rights of Man, by Thomas Paine	50

Books in paper covers.

These books have five half-tone illustrations, with elegant covers, equal to, and in many cases better than, books sold at 50 cents.

Wilson's Library of Fiction.

Mailable at one cent per pound.

——	A Love Crime, by Paul Bourget	$ 25
——	Shifting Love, by George Moore	25
——	A Marriage in High Life, by Octave Feuillet	25
——	Life, Character, and Daring Exploits of the Younger Brothers	25
——	The Red Lottery Ticket, by F. Du Boisgobey	25
——	In the Arms of Love, by Abi. S. Jackman	25
36 ——	The Age of Reason, by Thomas Paine	25
——	The Rights of Man, by Thomas Paine	25
——	Life of Frank and Jesse James	25
——	Ingersolia: Gems of Thought, by R. G. Ingersoll	50
——	Prince of Mull: A Glimpse of Royal Life	50
——	Silent Bliss, by Washington Davis	50

Miscellaneous books in paper covers.

Not mailable.

——	The Decameron of Boccaccio	50
——	The Book of Nature, by Dr. Faulkner	50
——	Stolen Sweets, by W. W. Knott	50
——	Serpent Sin	50
——	Rube Burrows	25
——	Fruits of Philosophy, by Annie Besant	25
——	The Law of Population, by Annie Besant	25
——	Volney's Ruins, by Volney	25
——	Life of a Wild Bull, by Buel	25

Name: —— ——.
Town: ——.
State: ——.

To the admission of which, all and singular, the defendant, by his counsel, objected for the reason that no proper foundation had been laid for the same; that the same and each part thereof is incompetent; which objection the court then and there overruled and admitted the said circulars and envelopes in evidence; to which
37 the defendant then and there duly excepted.

And thereupon the district attorney offered in evidence a copy of the 100th edition of the said book, "Stolen Sweets" or "W. W. W. & W.," by William Wilson Knott, illustrated by Edward Mason, Chicago, and edited by the Bow Knott Publishing Company, 144 La Salle street, Chicago.

One copy of the book "The Mysteries of the Court of London," by G. W. M. Reynolds, published by the Nile Publishing Company of Chicago, 1891, and bearing the imprint, "Copyright, 1891, by the Nile Publishing Company;" which said two books last aforesaid were identified by the witness Irle as the same books which had been purchased by him from said Miss Ida Wilson.

Also the district attorney then and there offered in evidence one copy of the 24th edition of the book "Stolen Sweets, or W. W. W. & W.," by William Wilson Knott, illustrated by Edward Mason, of Chicago, and published by the Bow Knott Publishing Company, 144 La Salle street, Chicago.

One copy of the book "Mysteries of the Court of London," by G. W. M. Reynolds, published by the Nile Publishing Company, Chicago, 1891, and bearing the imprint, "Copyright, 1891, by the Niles Publishing Company."

Also a copy of the book "Bel-Ami," by Guy de Maupassant, published by the Nile Publishing Company, Chicago, and reciting upon its title-page as follows: "Nile series, published monthly by subscription, $6 per year, volume 2, No. 1, February, 1892, and entered at Chicago post office as second-class matter."

Also a copy of the book Madamoiselle de Maupin, by Theophile Gautier, published by the Nile Publishing Company, Chicago,
38 reciting on its title-page as follows: "Nile series, issued monthly by subscription, $6 per year, vol. 1, February 1, 1891, entered at Chicago post office as second-class matter."

Which four books last aforesaid were identified by the said witnesses McAfee and McGleon as having been received by express at O'Fallon, Illinois, addressed to John Hobart, O'Fallon, Illinois, c. o. W. U. T. C.

ROBERT MCAFEE recalled:

I know Mr. Householder, the superintendent of carriers. I know the witness Voss.

Q. Do you know whether or not Mr. Householder was present when the letter, of which this is a copy (letter of 25th of April, 1892, shown witness), was delivered to the carrier?

(Objected to by defendant as immaterial and incompetent. Objection overruled. Exception taken by defendant.)

A. I can only say in reference to this man——

Counsel for defendant interrupted: I insist that the witness has been asked a direct question, and he should answer whether he remembers or not.

The COURT: He may answer in his own way.

(Exception by defendant's counsel.)

A. I go to the office with a letter I wish to be delivered, but where the letters are located and what carrier is going to take them I don't know. I go to Mr. Householder and ask to have them delivered.

The COURT: Are you stating the general practice or the practice in this case?

39 WITNESS: I think it is the general practice. I think it was the practice in this case. I am not positive of it. I know positively that the letter was delivered into the hands of the carrier, but whether I delivered it to him or the superintendent I will not say. I know it went into his hands. I prepared the slip for him to sign. I prepared the other slips.

And thereupon the Government rested its case.

Which was all the evidence heard by the court upon the trial of the said above-entitled cause which tended to show the guilt of the defendant.

Be it further remembered that afterwards, in his closing argument to the jury in the said case, the assistant United States district attorney spoke as follows: "They say Wilson is a man of good character. It is a grand thing for a young man in Chicago to be the son of an honest man, because blood will tell. If the father is honest the chances are the son will be honest also. Men live all their lives to build up a good character, because it is the shield against the attack of infamy. They called two or three witnesses here who testified to this young man's character as being good so far as they know, but I want to say to you, gentlemen of the jury, that if I am ever charged with a crime I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high heaven and testify to my innocence of the crime."

40 To which counsel for defendant duly excepted, and thereupon counsel for defendant called the attention of the court to the language used by the district attorney and notified the court of an exception thereto, and the court said, "Yes, I suppose the counsel should not comment upon the defendant not taking the stand. While the United States court is not governed by the States' statutes, I do not know that it ought to be the subject of comments of counsel."

And thereupon the assistant district attorney proceeded as follows: "I did not mean to refer to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf."

To which counsel for defendant then and there again excepted.

And thereupon the defendant requested the court to charge the

jury that if the jury believe from the evidence that the only offense against the United States committed by the defendant was committed solely at the instigation and solicitation of the witness Robert McAfee, the jury should find the defendant not guilty, but the court then and there refused to charge as requested; to which the defendant then and there excepted.

And inasmuch as the said several proceedings and exceptions do not appear of record in such case, this bill of exceptions is presented to the court here by the defendant with a prayer that the same be signed by the court here, which is done accordingly.

R. BUNN,
District Judge.

(Endorsed:) Filed December 24, 1892. S. W. Burnham, clerk.

41 On the same day, to wit, the twenty-fourth day of December, 1892, came the said defendant, by his solicitor, who filed in the clerk's office of said court his petition and assignment of errors; which said petition and assignment of errors *is* in the words and figures following, to wit:

Petition and Assignment of Errors.

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } *ss:*

In the District Court Thereof, November Term, A. D. 1892.

THE UNITED STATES
vs.
GEORGE E. WILSON. } 1943. Indictment.

And now comes the defendant, George E. Wilson, by C. Stuart Beattie, his attorney, and says that in the record and proceedings of the said district court in the above-entitled cause error hath intervened to his prejudice, and this defendant here assigns the following errors, to wit:

Assignment first. That the said district court erred in overruling the motion of this defendant to quash the said indictment and each count thereof in the manner and form aforesaid.

Assignment second. That the said district court erred in permitting the witness Robert McAfee to make answer to the question following, to wit:

42 "Q. Now, did you receive this in reply to your letter?

A. Yes; it must have been in response to my letter. It contained these circulars and blanks; nothing but printed matter."

Assignment third. The said district court erred in permitting the witness Ida Wilson to answer the following questions, to wit:

"Q. Did you ever see any of these circulars down there at his place?

A. It look- very much like it."

Assignment fourth. The district court erred in permitting the witness Ida Wilson to answer the following question, to wit:

"Q. Will you tell me, if the court says it is proper to answer, whether or not you sent out any answers to the mail you received?"

"A. I answered some letters."

Assignment fifth. The district court erred in permitting the district attorney to make secondary proof of the following letter, to wit:

"O'FALLON, ILLINOIS, *December* 27, 1891.

"G. E. Wilson, Esq., publisher, 415 Dearborn street, Chicago.

"DEAR SIR: Please send me list of your publications suitable for private reading.

"Yours truly, JOHN HOBART,
"*c. o. W. U. T. C.*"

Assignment sixth. The district court erred in overruling the defendant's objection to the admission of secondary evidence of the letter last aforesaid, to wit: That the defendant had not had
43 sufficient time after service of the notice to make search for the original; that the said notice was informal and insufficient in failing to inform the defendant that secondary evidence of said letters would be offered in evidence, and that there was no evidence that the original letter had ever been in the custody of this defendant.

Assignment seventh. The district court erred in permitting the district attorney to make secondary proof of the following letter, to wit:

"O'FALLON, ILLS., *January* 5, 1892.

"G. E. Wilson & Co., 415 Dearborn street, Chicago, Ill.

"GENTLEMEN: Thanks for list of books just received. I send you two dollars for the following: 'Mysteries of the Court of London,' 'Bel-Ami,' 'Mademoiselle de Maupin,' and 'Stolen Sweets.' I will undoubtedly want many on your list, and if you can allow me anything in discount you will oblige—

"JOHN HOBART."

Assignment eighth. The district court erred in overruling the defendant's objection to the admission of secondary evidence of the letter last aforesaid, to wit, that the defendant had not had sufficient time after service of the notice to make search for the original; that the said notice was informal and insufficient in failing to inform the defendant that secondary evidence of said letter would be offered in evidence, and that there was no evidence that the original letter had ever been in the custody of this defendant.

44 Assignment ninth. The district court erred in permitting the district attorney to make secondary proof of the following letter, to wit:

"COLLINSVILLE, ILL., 4, 23, '92.

"*Q.* E. Wilson, 314 State street, Chicago, Ill.

"DEAR SIR: Some time since I received some books from you. Will thank you to send me list of your new books. Address—

"JACK HORNER,
"*c. o. Vandalia Line.*"

Assignment tenth. The district court erred in overruling the defendant's objection to the admission of secondary evidence of the letter last aforesaid, to wit, that the defendant had not had sufficient time after the service of the notice to make search for the original; that the said notice was informal and insufficient in failing to inform the defendant that secondary evidence of said letter would be offered in evidence, and that there was no evidence that the original letter had ever been in the custody of this defendant.

Assignment eleventh. The district court erred in overruling defendant's motion to strike from the record the testimony of the witness Andrew Irle, to wit: "I am connected with the Chicago post office as clerk. I know McAfee. I know the defendant. I was in his place of business on the 4th of May last, about six o'clock. I saw Miss Ida Wilson. The defendant was there in the rear of the store, at a desk. I had this letter and circular (indicating) in my pocket. Miss Wilson came and waited on me. I laid the circulars so that she could see them and she took them. I ordered some books that I had marked on these circulars. I got the two circulars from McAfee. I bought two books—one copy of 'Stolen Sweets' and one copy of 'The Mysteries of the Court of London.' These are the books. (Books shown to witness.) I gave Miss Wilson a silver dollar. She went back to where Wilson was sitting. I went back a little so I could see, and I saw her talk to Wilson. Then she brought the books back and gave me fifty-three cents in change. The retail price of the books was fifty cents each. I got them at wholesale rates. I did not hear what she said to him. She had the circular in her hand at the time."

Assignment twelfth. The district court erred, in ruling upon the motion of the defendant last aforesaid, in saying in the presence of the jury, to wit, "No, I think not; it merely bears on Wilson's connection with this thing. He is not charged with the selling of the books, and he would not be liable for that under the act of Congress. There is no law of Congress against the sale of the books, but it all bears upon his sending out these circulars and shows the whole business carried through the mails."

Assignment thirteenth. The district court erred in overruling the motion of the defendant to strike out all the testimony of the witness McAfee relating to the pretended copies of the said several letters which it was claimed defendant had received from McAfee.

Assignment fourteenth. The district court erred in passing upon the motion of the defendant last aforesaid in saying in the presence of the jury, to wit, "No; I think he directed them to the defendant Wilson, but enclosed them in another envelope directed to

the superintendent of mails. The evidence of the last wit-
46 nesses show they were delivered to the defendant as directed by the witness McAfee."

Assignment fifteenth. The district court erred in admitting in evidence over the objection of the defendant the said circulars, as follows, to wit:

Order Blank of G. E. Wilson's Publications.

312 State street, Chicago, Illinois.

GENTLEMEN: Please send by ——

Books in cloth.

—— Decameron of Boccaccio	$1 50
—— Paine's Theological Works	1 00
—— Paine's Political Works	1 00
—— Ingersolia: Gems of Thought, by R. G. Ingersoll	1 00
—— Col. R. G. Ingersoll's 44 Lectures	1 00
—— Bank and Train Robbers of the West	1 00
—— The Age of Reason, by Thomas Paine	50
—— The Rights of Man, by Thomas Paine	50

Books in paper covers.

These books have five half-tone illustrations, with elegant covers, equal to, and in many cases better than, books sold at 50 cents.

47 Wilson's Library of Fiction.

Mailable at one cent per pound.

—— A Love Crime, by Paul Bourget	$ 25
—— Shifting Love, by George Moore	25
—— A Marriage in High Life, by Octave Feuillet	25
—— Life, Character, and Daring Exploits of the Younger Brothers	25
—— The Red Lottery Ticket, by F. Du Boisgobey	25
—— In the Arms of Love, by Abi S. Jackman	25
—— The Age of Reason, by Thomas Paine	25
—— The Rights of Man, by Thomas Paine	25
—— Life of Frank and Jesse James	25
—— Ingersolia: Gems of Thought, by R. G. Ingersoll	50
—— Prince of Mull: A Glimpse of Royal Life	50
—— Silent Bliss, by Washington Davis	50

Miscellaneous books in paper covers.

Not mailable.

—— The Decameron of Boccaccio	50
—— The Book of Nature, by Dr. Faulkner	50
—— Stolen Sweets, by W. W. Knott	50

—— Serpent Sin ..... $ 50
—— Rube Burrows 25
—— Fruits of Philosophy, by Annie Besant 25
—— The Law of Population, by Annie Besant 25
—— Volney's Ruins, by Volney 25
—— Life of a Wild Bull, by Bill 25

Name: —— ——.
Town: ——.
State: ——.

48 Assignment sixth. The district court erred in admitting in evidence over the objection of the defendant the said circular as follows, to wit:

Notice.—Books marked # not mailable at second-class rates.

Order Blank.

—— —, 1892.

G. E. Wilson & Co., booksellers and publishers, 312 State street, Chicago.

Please send by ——
—— copies # Mysteries of the Court of London, by George W. M. Reynolds ..... $ 50
—— copies # Rose Foster (part II of the Mysteries of the Court of London), by — W. M. Reynolds 50
—— copies # Caroline Walters (part III of the Mysteries of the Court of London), by George W. M. Reynolds 50
—— copies # Pauline Clarendon (part IV of the Mysteries of the Court of London), by George W. M. Reynolds 50
—— copies # Venetia Trelawney (part I of the second series of the Mysteries of the Court of London), by George W. M. Reynolds 50
—— copies # Louisa Stanley (part II of the second series of the Mysteries of the Court of London), by George W. M. Reynolds 50
—— copies # Caroline of Brunswick (part III of the second series of the Mysteries of the Court of London),
49 by George W. M. Reynolds 50
—— copies # Ariadne Varian (part IV of the second series of the Mysteries of the Court of London), by George W. M. Reynolds 50
—— copies # Droll Stories, by Honore de Balzac 50
—— " " " cloth 1 25
—— " # The Heptameron of Margaret de Navarre 50
—— " " " 1 25
—— " Mademoiselle Giraud, My Wife, by Adolph Belot 50
—— " Bel Ami, by Guy de Maupassant 50
—— " The Woman of Fire, by Adolph Belot 50

—— copies Mademoiselle de Maupin, by Gautier..... $ 50
—— " The Shadow of Shame, by Austyn Granville... 50
—— " Viola Fairfield's Secret, by L. J. Leah..... 25
—— " Fortune, by Gautier 25
—— " Money, by Emile Zola..... 25
—— " The Fortune of the Rougons, by Emile Zola..... 25
—— " Sappho, by Alphonse Daudet..... 25
—— " Son of Clemenceau, by Alexandre Dumas, fils.. 25
—— " Clemenceau Case, by Alexandre Dumas, fils.... 25
—— " # Kreutzer Sonata, by Leo Tolstoi..... 25

Name: —— ——.
Town: ——.
State: ——.

50 Assignment seventeenth. The district court erred in permitting the witness Robert McAfee to testify as follows:

"I go to the office with a letter I wish to be delivered, but where the letters are located and what carrier is going to take them I do not know. I go to Mr. Householder and ask to have them delivered. I think this is the general practice. I think it was the practice in this case. I am not positive of it. I know positively the letter was delivered into the hands of the carrier; whether I delivered it to him or the superintendent I cannot say. I know it went into his hands. I prepared the slip for him to sign. I prepared the other slips."

Assignment eighteenth. The district court erred in permitting the said district attorney in his closing argument to say, "They say Wilson is a man of good character. It is a grand thing for a young man in Chicago to be the son of an honest man, because blood will tell. If the father is honest the chances are the son will be honest also. Men live all their lives to build up a good character, because it is a shield against the attack of infamy.

They called two or three witnesses here who testify to this young man's character being good so far as they know, but I want to say to you, gentlemen of the jury, that if I am ever charged with a crime I will not stop by putting witnesses on the stand to testify to my good character, but I will go on the stand and hold up my hand before high heaven and testify to my innocence of the crime."

Assignment nineteenth. The said district court erred in permitting the said district *court* to say in his closing argument, "I did not mean to refer to it in that light, and I do not intend
51 to refer in a single word to the fact that he did not testify in his own behalf.

Assignment twentieth. The said district court erred in refusing to charge the jury as follows, to wit: "That if the jury believe from the evidence that the only offense against the United States committed by the defendant was committed solely at the instigation and solicitation of the witness Robert McAfee, the jury should find the defendant not guilty."

Assignment twenty-first. The said district court erred in render-

ing judgment and sentence in the manner and form aforesaid, because the verdict aforesaid is not supported by any sufficient evidence; and, because of these said several errors and other errors apparent on the face of the record here, the said defendant prays that the judgment of the said court may be reviewed and reversed.

And defendant will ever pray, etc.

C. STUART BEATTIE,
For Defendant.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

In the District Court thereof, Northern Division, November Term, A. D. 1892.

THE UNITED STATES *vs.* GEORGE E. WILSON. } Indictment.

52 To the honorable the judge of the said district court:

Your petitioner, George E. Wilson, respectfully represents unto your honor that he was convicted at the said November term of the said district court of an infamous crime, and upon said conviction sentenced to the penitentiary for the term of two years. Your petitioner prays that the court here will grant to petitioner the writ of error to the said district court returnable to the next term of the Supreme Court of the United States; that the said writ of error may be made a supersedeas and your petitioner admitted to bail pending the hearing of the same, and that said judgment of the district court may be reviewed and reversed.

And your petitioner will ever pray, etc.

C. STUART BEATTIE,
For Defendant.

Let writ of error issue to U. S. Supreme Court without supersedeas.

P. S. GROSSCUP,
District Judge.

(Endorsed:) Filed December 24, 1892. S. W. Burnham, clerk.

53 Afterwards, to wit, on the fifth day of January, A. D. 1893, in the December, 1892, term of said court, in the record of proceedings of said court in said entitled cause, before Hon. Peter S. Grosscup, judge, appears the following entry, to wit:

THE UNITED STATES *vs.* GEORGE E. WILSON. } Indictment.

And this day comes the said defendant, by his attorney, and presents to the court here his assignment of errors and a petition severally heretofore filed in said above-entitled cause, and upon motion

of said attorney it is ordered by the court that the said defendant be, and he is hereby, allowed a writ of error in said above-entitled cause from the Supreme Court of the United States to this court, and that said writ of error issue in the premises without prejudice to the said plaintiff in error to move hereafter for supersedeas and bail herein.

On the same day, to wit, the fifth day of January, A. D. 1893, there was filed in the clerk's office of said court in said entitled cause a bond on writ of error; which said bond is in the words and figures following, to wit:

Bond.

54 Know all men by these presents that we, Geo. C. Wilson and C. Stuart Beattie, are held and firmly bound unto The United States in the full and just sum of two hundred and fifty dollars, to be paid to the said United States, its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 5th day of January, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at a term of the district court of the United States in and for the northern division of the northern district of Illinois, in a suit depending in said court between the United States and said George E. Wilson, wherein judgment was rendered against the said George E. Wilson, and the said George E. Wilson having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States, citing and admonishing it to be and appear at the United States Supreme Court for the — to be holden at Washington, D. C.:

Now, the condition of the above obligation is such that if the said George E. Wilson shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

GEO. E. WILSON. [SEAL.]
C. STUART BEATTIE. [SEAL.]

Approved by—
P. S. GROSSCUP,
District Judge.

(Endorsed:) Filed Jan. 5, 1893. S. W. Burnham, clerk.

55 Afterwards, to wit, on the first day of February, 1893, in the December term of said court, 1892, in the record of the proceedings thereof in said entitled cause, before Hon. Peter S. Grosscup, judge, is the following entry, to wit:

Entry.

UNITED STATES
vs.
GEORGE E. WILSON. } 1943. Indictment.

And this day comes the district attorney, on behalf of the United States, and the defendant, by C. Stuart Beattie, his counsel, and it appearing to the court from evidence now here before it that on the second day of December, 1892, said defendant was by the court here allowed thirty days then next following in which to prepare and present to the court here his bill of exceptions and petition for a writ of error in said above-entitled cause, and that said order was by inadvertence left out of the record of this court in said cause, it is therefore ordered that permission be, and the same is hereby, given to said George E. Wilson to present to the court here his bill of exceptions and petition for a writ of error in said above-entitled cause within thirty days from the second day of December, 1892, and this order be entered of record in said cause *nunc pro tunc* of December second, 1892.

56 NORTHERN DISTRICT OF ILLINOIS, } *ss:*
Northern Division, }

I, S. W. Burnham, clerk of the district court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein The United States of America are plaintiffs and George E. Wilson is defendant, as the same appears from the records and files of said court now remaining in my custody and control.

Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this second day of February, 1893.

S. W. BURNHAM, *Clerk.*

57 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

The United States of America to the judge of the district court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said district court, between The United States of America, plaintiff, and George E. Wilson, defendant, in an action of indictment, a manifest error hath happened, to the great damage of the said George E. Wilson, defendant, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings

aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fourth day of February, A. D. 1893, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 5th day of January, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the 117th year.

Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.

S. W. BURNHAM,
Clerk U. S. Circuit Court, Nor. Dist. Ill.

[Endorsed:] Supreme Court of the United States. George E. Wilson, plaintiff in error, *vs.* United States of America, defendant in error. Writ of error. Copy deposited for the defendant in error in the clerk's office U. S., northern district of Illinois.

58 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the fourth day of February, A. D. 1893, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the northern district of Illinois, wherein George E. Wilson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Peter S. Grosscup, judge of the United States district court in and for the northern district of Illinois, this fifth day of January, in the year of our Lord one thousand eight hundred and ninety-three.

PETER S. GROSSCUP,
District Judge.

I accept service of this citation Jan. 5, 1893.
THOMAS E. MILCHRIST, *U. S. Att'y.*

[Endorsed:] Supreme Court of the United States. George E. Wilson, plaintiff in error, *vs.* United States, defendant in error. Citation to February 4, A. D. 1893.

Endorsed on cover: Case No. 15,254. N. Illinois D. C. U. S. Term No., 1284. George E. Wilson, plaintiff in error, *vs.* The United States. Filed February 7th, 1893.

Office Supreme Court U. S.
FILED.
MAR 30 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

October Term, A. D. 1892.

GEORGE E. WILSON,
Plaintiff in Error,

vs.

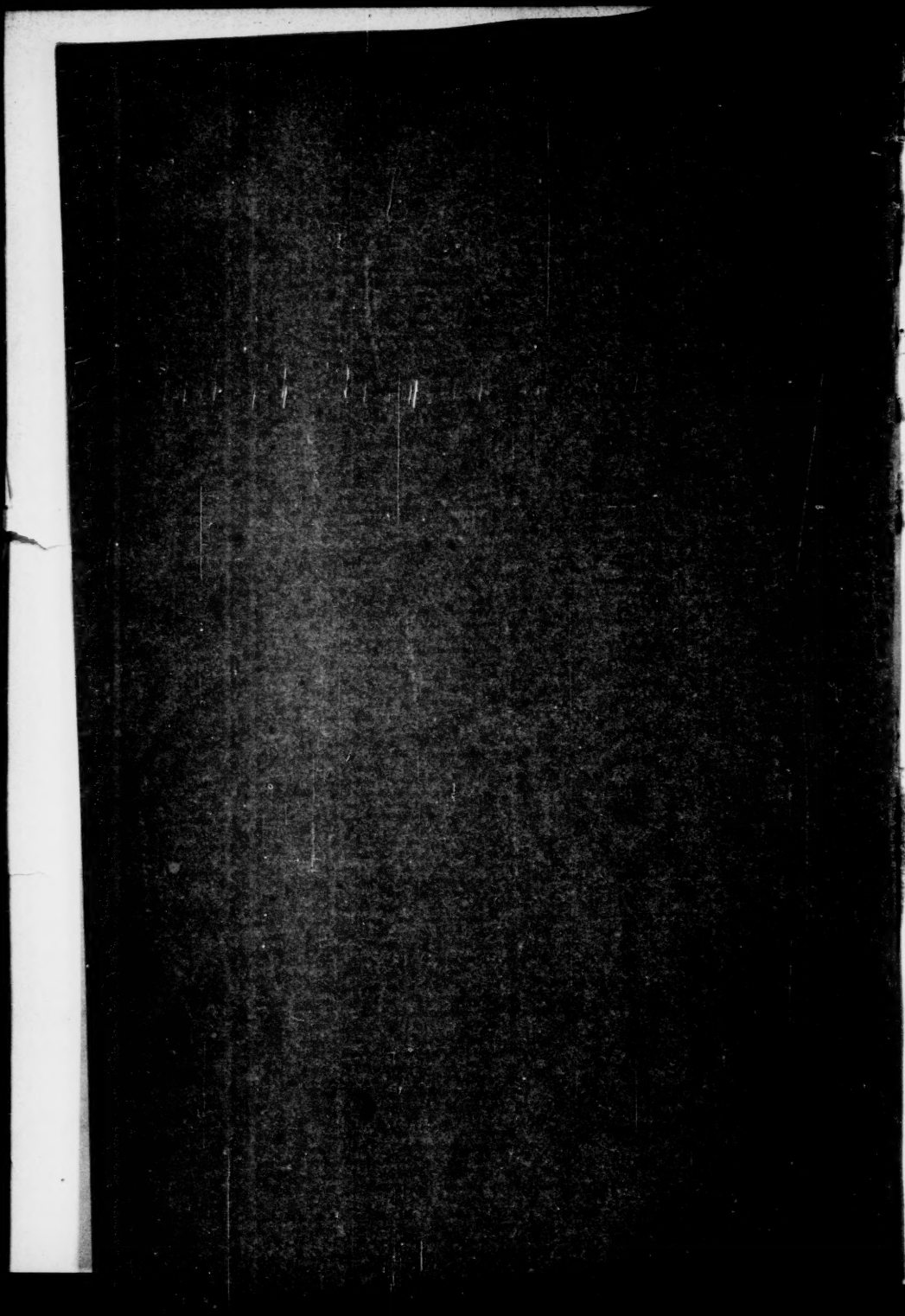
THE UNITED STATES,
Defendant in Error.

Error to the District Court, for the Northern Division of the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

C. STUART BEATTIE,
Of Counsel for Plaintiff in Error.

HORACE O'DONOGHUE, PRINTER, 192 SOUTH JEFFERSON STREET CHICAGO.



IN THE

Supreme Court of the United States

October Term, A. D. 1892.

GEORGE E. WILSON,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

Error to the District Court, for the Northern Division of the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

May it please the court:

Plaintiff in error was convicted in the court below of a violation of section two of the act of September 26, 1888 (25 stat. at large 496), concerning the use of the postal service for obscene literature. The indictment charged in different counts that the defendant, by himself or another, deposited in the mail at Chicago, for delivery to John Hobart, at O'Fallon, Illinois, and Jack Horner, at

Collinsville, Illinois, a letter and circular giving information where certain lewd, lascivious and obscene books could be procured, and names the books in the different counts: "Stolen Sweets," "Bel Ami," "Mademoiselle de Maupin" and "Mysteries of the Court of London."

It appears from the record that one Robert McAfee, who holds a commission from the government as a post-office inspector, and is the active principle of an association known as the Western Society for the Suppression of Vice, wrote a letter to plaintiff in error about December 28, 1891, asking for a list of publications "suitable for private reading." In reply an envelope reached Mr. McAfee containing several business circulars of plaintiff in error, who was a book-seller and publisher at 415 and 417 Dearborn street, Chicago. These circulars mentioned the books named in the indictment as for sale by plaintiff in error, among some fifty other works named principally of secular and sensational character, including "Paine's Age of Reason," and the "Life of Jesse James." From these circulars Mr. McAfee ordered by mail the four books named to be sent to him at O'Fallon, which was done, the books being received at O'Fallon by express on January 4, 1892. In this correspondence Mr. McAfee took the name of and signed himself "John Hobart," and the circulars and books were sent addressed to "John Hobart."

Subsequently, in April, 1892, Mr. McAfee again wrote to plaintiff in error, asking for "a list of new books," and received by mail circulars similar to those first received, and he procured another employee of the government to go to plaintiff in error's place of business and purchase a copy of "Stolen Sweets" and "Mysteries of the Court of London." In this last transaction Mr. McAfee

took the name of Jack Horner, and the circulars were addressed to that name at Collinsville, Ill.

It appears from the evidence that the first letter written by Mr. McAfee was delivered by the postman to Miss Ida Wilson, a sister and clerk of plaintiff in error, who, being called by the government, admits that the envelope address of "John Hobart, O'Fallon, Ills.," is in her writing. The "Jack Horner" letter was delivered to Miss Markland, also a clerk, for plaintiff in error, but the government did not attempt to show any further connection between it and plaintiff in error.

Upon this testimony the jury found plaintiff in error guilty, and the court sentenced him to confinement in the penitentiary at hard labor for two years.

The plaintiff in error urges that the court below erred.

First — In overruling a motion, interposed before plea, to quash the several counts of the indictment.

Second — In admitting in evidence over the objection of defendant secondary evidence of the following letter:

"O'FALLON, Ill., December 27, 1891.

"Geo. E. Wilson, Publisher,

"415 Dearborn St., Chicago, Ills.

"DEAR SIR — Please send me a list of your publica-
"tions suitable for private reading.

"Yours truly,

"JOHN HOBART."

Third—In permitting the counsel for the government in his closing argument to make reference to the fact that the defendant has not testified in the cause.

Fourth—In refusing to charge the jury as asked by defendant, as follows: "That if the jury believe from the "evidence that the only offense against the United States "committed by the defendant was committed solely at "the instigation and solicitation of the witness, Robert "McAfee, the jury should find the defendant not guilty."

I.

The indictment (*Record, p. 1*) contains six counts, which are alike in all respects except the name of the alleged objectionable book, and changes in the date and destination of mailing.

The first count is as follows: "That George E. Wil- "son, late of the City of Chicago, in said division and dis- "trict, on the twenty fifth day of April, &c., 1892, at "Chicago aforesaid, unlawfully did knowingly deposit and "cause to be deposited in the post-office of the United States, "at Chicago aforesaid, for mailing and delivery, a letter and "circular giving information where, how, of whom and by "what means a certain obscene, lewd and lascivious book "and publication of an indecent character, entitled "'Stolen Sweets,' might be obtained, which said letter and "circular was addressed to 'Jack Horner, Collinsville, "Ills.'"

Plaintiff in error moved to quash each count of the indictment and the motion was overruled (*Record, p. 4*). The motion was based upon written points filed (*Record, p. 6*). And two principal objections were urged in its support, to which we here call the attention of this court.

Each count charges the mailing of a circular and letter giving information, &c., where the alleged obscene book could be procured. There is no claim that the matter deposited in the mail was obscene, and the only

description which the pleader offers of the mailed matters is a general expression—" a letter and circular," confining the description only by the subsequent statement, in effect, that the pleader meant some one of the letters or circulars, if any or either, sent on the day named, addressed to the person named.

It is, plaintiff in error insists, a universal rule of pleading in this class of cases that the alleged non-mailable matter should be set out *in hæc verba*, or some *legal* excuse shown in the indictment for such failure, in which case a description of the matter is sufficient. In support of this objection to each count of this indictment the following authorities are submitted:

" It has also been ruled that if the grand jury declare " of an indecent libel 'that the same would be offensive " to the court here, and improper to be placed on the " records thereof,' the non-setting forth of the libel will be " thereby sufficiently excused, but in such case it is neces- " sary to specifically aver the reason of the omission. " And in any view it is proper on principle that the ob- " scene paper should be in some way individuated."

Wharton's Crim. P. & P. (9th Ed.) sec. 177.

" In framing the indictment (for mailing obscene mat- " ter) the rules prevail which are laid down in respect to " the pleading of obscene publications in indictments for " libel."

2 Wharton's Crim. L. (9th Ed.) sec. 1831.

Mr. Justice BLATCHFORD, while on the Circuit bench, went over the question here in *Bennett* v. *U. S.*, 16 Blatch. 338.

In that case the indictment charged in each count the

deposit of "a certain obscene, lewd and lascivious book "called Cupid's Yokes, which said book is so lewd, ob- "scene and lascivious that the same would be offensive to "the court here, and improper to be placed upon the rec- "ords thereof." And the objections to the indictment were overruled by the court upon the express ground that the American rule permitted the reason given as an excuse for not setting out the obscene matter.

In *Commonwealth* v. *Philips*, 16 Pick. 211, SHAW, C. J., observed: "The salutary rule of the common law, "that no one shall be held to answer to an indictment or "information, unless the crime with which it is intended to "charge him is expressed with reasonable precision, direct- "ness and fulness, that he may be fully prepared to meet, "and if he can to answer and to repel it, is recognized and "enforced, and extended to every mode in which a citizen "can be called to answer any charge or crime in this com- "monwealth, by the highest authority known to the laws, "namely, an express provision in the Bill of Rights, article "12. It declares that no subject shall be held to answer "for any crime or offense, until the same is fully and plainly, "substantially and formally, described to him.

"The reasonable degree of certainty required in an "indictment is so familiar that it requires no authorities to "support or illustrate it. (1 Chitty's Criminal Law, 170.) "Whilst it is important to the administration of public "justice and the reasonable execution of the laws, that "indulgence should not be too readily yielded to mere "technical niceties and subtleties, it is also important that "every man accused of crime should have a reasonable "opportunity to know what the charge is; that he may not "be called to meet evidence at the trial that he could not "have anticipated from the charge; that the court may

" know what judgment to render ; and that the party tried " and either acquitted or convicted may be enabled by " reference to the record to shield himself from any future " prosecution for the same offense."

In *Commonwealth* v. *Wright*, 139 Mass. 382, DEVENS J. said: "This is an indictment under the Pub. Sts. c. " 207, sec. 15, for publishing and distributing a printed " paper containing obscene, indecent and impure language. " In both of the counts upon which the defendant was con- " victed, it is alleged to be a paper so obscene in its charac- " ter that it cannot with decency be spread upon the records " of the court. No general description of it by title or con- " tents is given in the indictment, nor are any other means " afforded hereby which would distinguish it from any other " paper of its class. Before the trial, the defendant moved " to quash the indictment, among other reasons, because it " afforded no proper description of the alleged obscene " paper.

" It has heretofore been held that an obscene publica- " tion need not be spread at length upon the records of the " court, by a recital thereof *in extenso* in the indictment. " (*Commonwealth* v. *Tarbox*, 1 Cush. 66.) To hold other- " wise would require that permanency and notoriety should " be given indecent publications in order that they might be " punished, which would be highly objectionable.

" But while the indecent publication need not be set " forth at length, and it is sufficient in the indictment to " allege, as an excuse for not doing so, its scandalous and " obscene character, it must be identified by some general " description which shall show what the paper is which the " defendant is charged with publishing. Unless this is done " it is obvious that the defendant is not informed with such " precision as the law requires, of the offense charged

" against him, and may be entirely deceived in regard to " the paper to which the obscene character is attributed.

" Nor, would the indictment afford the protection to " the defendant to which he is entitled, should he be subse- " quently indicted for the same offense. In *Commonwealth* " v. *Holmes, ubi supra*, the book with which the defendant " was charged with publishing was identified by its title. " In *Commonwealth* v. *Tarbox, ubi supra*, it is said that, " where a publication is so obscene that it should not appear " on the record, 'the statement of the contents may be " omitted altogether, and a description thereof substituted, " the reason for the omission being made to appear by " proper averments;' but the remark implies that there must " be an appropriate description of the publication. It is " not easy to conceive a case in which the means would not " exist, having full regard to decency and propriety, of " describing generally, and thus identifying the paper which " the defendant is charged with publishing.

" The indictment in this case at bar did not seek to " do so in any manner, and yet the means for doing so " were ample, so far as the publication offered in evidence " was concerned. It was printed upon the back of the " business card of the defendant, which contained itself no " indecency. It was headed, 'Wanted, by a wet nurse,' " and purported to recite a conversation between a young " lady and the editor of a local paper. Other modes of " describing the paper might be also readily suggested, " none of which were availed of.

" As the indictment does not set forth the offense in " the manner required by law, the order must be:

" 'Exception sustained, and indictment quashed.'"

Com. v. *Dejardin*, 126 Mass. 46, MORTON, J., said: " It is clear the indictment is founded on the first clause

"of the statute. This clause prohibits the importation, "printing, publishing, selling or distributing 'any book, "pamphlet, ballad, printed paper, or other thing contain- "ing obscene, indecent or impure language, or containing "any obscene, indecent or impure prints,' &c. * * * "An indictment under this clause should aver that the "defendant imported, printed, published, sold or distrib- "uted a book, pamphlet, ballad, printed paper or other "thing, *describing it*, containing obscene or indecent lan- "guage, or obscene or indecent prints, *describing them*, "*or giving an excuse for not particularly describing* "*them.*" (Citing) *Com.* v. *Holmes*, 17 Mass. 336; *Same* v. *Tarbox*, 1 Cush. 66.

In *Com.* v. *Tarbox*, 1 Cushing, FORBES J., said: "The "matter charged in this indictment, if properly set out, "could clearly constitute an offense. In indictments for "offenses of this description, it is not always necessary "that the contents of the publication should be inserted; "but, whenever it is necessary to do so, or whenever the "indictment undertakes to state the contents, whether "necessary or not, the same rule prevails as in the case of "libel; that is to say, the alleged obscene publication must "be set out in the very words of which it is composed, "and the indictment must undertake or profess to do so "by appropriate language. The excepted cases occur "whenever a pub'ication of this character is so obscene "as to render it improper that it should appear on the "record, and then the statement of the contents may be "omitted altogether, and a description thereof substi- "tuted; but in this case a reason for the omission must "appear in the indictment by proper averment."

People v. *Garadin*, 1 Manning, (Mich.) 90. The

court held the allegation of the indictment amounted to an excuse for not setting out the obscene matter.

State v. *Hayward*, 83 Mo. 299. SHERWOOD, J., delivered the opinion of the court. After a thorough citation of the English and American cases on the subject of indictments for obscenity; the opinion (page 305) says: "From that discussion, as well as from an examination, "the only point of difference observable between the rulings "in this country and in England is, that in the former the "words of the obscene libel must be set out *in hæc verba*; "in the latter, if the libel be too obsence to appear on the "records of the court, the indictment should give such "general description as decency permits, stating as an "excuse the reason why the obscene matter is not spread "at large upon the records, that the obscenity of the "omitted matter is too great to admit of this being done. "This excuse will be admitted in lieu of the matter omitted, "otherwise the indictment will be held fatally defective."

McNair v. *People*, 89 Ill. 441, was a prosecution under the very stringent statute of Illinois. The first count charged the defendant "unlawfully did cause to be "printed a certain obscene and indecent pamphlet with "intent, etc., to give the same away." The second count charged that he "unlawfully did have in his possession, "with intent to give away, a certain obscene and indecent "pamphlet, purporting to be evidence taken before a com-"mittee appointed by the Fox River Valley Medical Asso-"ciation in the matter of charges against O. L. Pelton, pre-"ferred by Dr. McNair." Error was prosecuted from a judgment of conviction below, and Mr. Justice WALKER, in reversing the conviction, said:

"It is first insisted that the court erred in refusing to "quash the indictment, that it is defective in not setting

" out what is claimed to be the obscene matter. On the " other hand, it is claimed the indictment is good,, and " entirely sufficient under section 408 of the Criminal Code. " That section provides that an indictment or accusation " of the grand jury shall be deemed sufficiently technical " and correct which states the offense in the terms and " language of the statute creating the offense, or so " plainly that the nature of the offense may be easily " understood by the jury. Section 223 of the Criminal " Code, under which the prosecution is had, is of recent " adoption in our State, and has not been previously before " us for construction. Whilst sec. 408 is broad and com- " prehensive, a majority of the court are of the opinion that " under this section it was necessary to set out the sup- " posed obscene matter in the indictment, unless the "obscene publication is in the hands of the defendant, or " out of the power of prosecution, or the matter is too " gross and obscene to be spread on the records of the " court, either of which facts, if existing, should be averred " in the indictment as an excuse for failing to set out the " obscene matter; that whether obscene or not, is a ques- " tion of law and not of fact; that the question is for the " court to determine, and not for the jury.

" The English precedents for libel, as well as in most " of the States of the Union, require the libelous matter " to be stated in full in the indictment, that the court may ' determine whether the article is libelous. Again, the " offense charged, whether in the language of the statute " or so as to be easily understood by the jury, should so " describe the offense that the judgment on the trial could ' be pleaded in the bar in another prosecution.

" In this indictment there is no such description as " would enable plaintiff in error to do so, unless it be the

"second count. Neither of the others have the remotest "reference to any particular pamphlet. The averment "would apply equally well to any one of many pamphlets. "They give no notice of any particular charge. These "can, under no construction of this section, be held "sufficient."

People v. *Danihy*, 63 Hun., decided at the March term, 1892, of the New York Supreme Court, fifth department, was a prosecution under the New York code for publishing an obscene communication. DWIGHT, P. J., said concerning the indictment:

"The rule which has always held in actions of libel, "either civil or criminal, is applicable to this case. A "complaint or indictment which only charged that the "matter complained of was libelous or defamatory would "certainly be bad, not because of a failure to identify the "matter, but because it did not appear on the face of "the pleadings that it was libelous or defamatory. And "so the two classes of actions or prosecutions have always "been classed together for the purpose of this rule; and it "has been held with great strictness that in all actions, "civil and criminal, in which the cause of action or offense "consists in the publication of written or printed matter "the words complained of must be set out in the com-"plaint or indictment. The cases of *Bradlaugh & Besant* "v. *Queen*, (L. R. 3 Q. B. div. 607), *Com.* v. *Tarbox* (1 "Cush. 66), *U. S.* v. *Bennett* (16 Blatch. 338), *Com.* v. "*Dejardin* (176 Mass. 46), are a few of those industri-"ously collected by the learned county judge, of "which a synopsis is given in his opinion. "They are directly in point, and in effect "base the rule on the reasons above considered, "and not as the court seems to have done in *People* v. *Hal-*

" *Ienbeck* (52 How. Pr. 502), on the ground of the neces-
" sity of clearly identifying the publication complained of.
" Identification is, of course, a requirement of the pleading,
" but in that respect, the count in question is not in fault.
" It describes the newspaper by name, its volume, number,
" date and place of publication. Moreover in its allegation
" of the manner in which the crime was committed, it ap-
" plies to the publication not only the term 'obscene,' but
" all the other descriptive terms used by the statute, in the
" alternative in defining the crime, viz: 'lewd, lascivious,
" filthy and indecent;' and still further it describes the news-
" paper as containing articles and stories of an indecent
" and immoral character. But, after all, these additions
" are only amplifications of the charge, and not demonstra-
" tions of its truth —a conclusion of fact, and not the facts
" themselves, relied upon to establish the charge made
" against the defendant."

This question has been before the district judges several times and they have with one exception, until this case, followed the well-settled rule.

In *United States* v. *Harmon, et al.*, 34 Fed. Rep. 872, Judge FOSTER said: " This indictment is drawn
" under section 3893, Rev. St. It charges that the defend-
" ant did unlawfully and knowingly deposit in the United
" States post-office, at Valley Falls, in this district,
" addressed to, and for the purpose of mailing and deliver-
" ing to various parties therein named, through the United
" States mails, a certain obscene, lewd and lascivious
" paper and publication of an indecent character, called
" 'Lucifer,' which paper and publication so deposited for
" mailing is so obscene, lewd and lascivious as to dispense
" with the corporation of the words and figures in this
" indictment, said parties well knowing that said paper

" and publication was non-mailable matter, contrary to the " form of the statute, etc. It will be observed that the " paper alleged to be obscene, and to have been mailed by " the defendants, is not described or identified in any " manner, except by its title, 'Lucifer.' It appears to "have been a newspaper published at stated periods at " Valley Falls. The date of the particular issue is not set " out, nor is the article or articles complained of identi- " fied by the title or contents.

"" There have been a great number of the papers issued " entitled 'Lucifer,' and probably mailed to these same " parties, and each and every one different from the others. " How are the accused to know what particular paper, or " what particular article in the paper, is referred to in the " indictment? The accused are entitled to be informed of " the specific charge made against them, and it must be " explicitly definite to enable them to prepare their defense " and present their evidence; and further, to enable them " in any future prosecution for the same offense to make a " plea of *autrefois acquit* or *autrefois convict*. This in- " dictment is clearly defective in this respect; nor can it " be helped out by a bill of particulars."

U. S. v. Kaltmeyer, 16 Fed. Rep. 260, was a prosecution for putting into the mails a letter giving prohibited information and to that extent similar to the case at bar. McCRARY, J., held that the general rule required the letter to be set out in the indictment, and after reviewing several cases said:

" This being so, then the only inquiry here is as to " whether there is any reason in the character of the paper " offered in evidence why it should not have been set out " in the indictment We are unable to see any. It is a " very brief letter, all written on one side of a sheet of

" note paper. There is nothing in it so indecent as that
" which is contained in the bill of indictment itself. It
" therefore falls very clearly, we think, within the rule
" that it ought to have been set out in the indictment. I
" am aware of the decision, referred to by the district at-
" torney, of a court for which we have a very high respect
" —the Circuit Court of the United States for the northern
" district of Illinois—to the contrary of this view of the
" question. It is there held that if the indictment sets out
" the letter or notice in substance that that is sufficient.
" But the opinion was based upon the authority of a case
" in the Supreme Court of the United States, reported in
" 7 Pet. 138 (the case of the *U. S.* v. *Mills*.) I have
" examined that case, and I think that so far it is an
" authority to the contrary. They hold that the indict-
" ment in that case was sufficient, but they also expressly
" say that the second count in the indictment sets out this
" particular letter. On page 142 of the same volume, the
" Supreme Court say that the instrument was set out in
" full, and I find nothing in the opinion that sustains the
" proposition that an indictment in such case would be
" good without setting out the instrument. On the other
" hand, the authorities are very numerous."

The case above referred to as having been decided by Judge DRUMMOND is undoubtedly *U. S.* v. *Bate* (10 Fed. Rep. 92), which is the only case in the books where it is intimated that an indictment substantially in form as here shown is sufficient. In that case the court refers to *U. S.* v. *Mills*, 7 Peters, 138, as authority for its position. As Judge MCCRARY says, in *Kaltmeyer's* case, *supra*, if the *Mills* case is any authority at all, it is against Judge DRUMMOND'S position.

When plaintiff in error was sent to a jury upon this

indictment, he was absolutely without knowledge or notice of what kind of a trap Mr. McAfee had set for him. Did the government intend to prove that a letter had been sent to John Hobart containing prohibited information, and that a circular had been sent to Jack Horner, or *vice versa*. Plaintiff in error had no knowledge of either of the persons; they were myths, they could give him no information. He had never heard of either of them, and, as the evidence subsequently showed, the government did not pretend that he had. Was the communication the government proposed to offer a letter or circular, or both? How did the communication give information? What information did it give? Plaintiff in error had never sent any letter or circular to either of the persons named. Who had sent such in his behalf and what had they sent? All these questions could have been settled with some degree of certainty in the mind of plaintiff in error had the government done its duty and tendered such an indictment as the law requires. What certainty is there in the indictment here to protect plaintiff in error from additional jeopardy? Any letter or circular which Mr. McAfee would testify he received by mail from plaintiff in error addressed to the persons named was competent evidence under this charge. How can one be distinguished from the other? The post-mark on the envelope would identify it, said the court below. Not at all, for we learn from the record in this case that Mr. McAfee can and did have envelopes stamped when and where and of what date he pleased. And no post-mark would be on the letter or circular contained in the envelope.

But why extend the argument upon lines of reason? Is the subject open to discussion, when every court in this country and England which has passed upon the question

has held that under the law this indictment is bad in substance ?

The second objection to each count of the indictment arises when testing it by the rule laid down in the following well known cases.

Said Mr. Justice CLIFFORD, " With rare exceptions, " offenses consist of more than one ingredient, and in " some cases of many, and the rule is universal that every " ingredient of which the offense is composed must be " accurately and clearly alleged in the indictment, or the " indictment will be bad and may be quashed on motion, " or judgment may be arrested or reversed on error. " (Citing) Arch. Cr. Pl. cases, 15th ed. 54."

U. S. v. *Cook*, 17 Wallace 168.

" It is a well established principle, that if all the facts " alleged in the indictment may be true, and yet consti- " tuted no offense, the indictment is insufficient. A ver- " dict does nothing more than to verify the facts charged, " and if these do not show the party guilty he cannot be " considered as having violated the law (citing) *Rex* v. " *Lyme Regis*, Doug. 153, *Com.* v. *Odlin*, 23 Pick 275."

State v. *Godfrey et al.*, 24 Me. 232.

U. S. v. *Carll*, 15 Otto 611: The indictment was under section 5,431. That every person, who, with intent to defraud, passes, etc , any forged obligation of the government, shall be punished, etc. BLATCHFORD and BENEDICT, J. J., had certified a division and asked whether it was necessary to charge not only the passing with fraudulent intent, of the forged paper, but also to charge knowledge in the defendant that the paper was forged. This court answered the question in the affirmative. Mr.

JUSTICE GRAY, delivering the opinion, said: "In an in-
"dictment upon a statute, it is not sufficient to set forth
"the offense in the words of the statute, unless those
"words of themselves fully, directly and expressly, without
"any uncertainty or ambiguity, set forth all the elements
"necessary to constitute the offense intended to be pun-
"ished; and the fact that the statute in question, read in
"the light of common law and of other statutes on the
"like matter, enables the court to infer the intent of the
"legislature, does not dispense with the necessity of alleg-
"ing in the indictment all the facts necessary to bring the
"case within that intent." (Citing) *U. S.* v. *Cruikshank*, 92 U. S. 542; *Same* v. *Simmons*, 96 U. S. 360; *Com.* v. *Clifford*, 8 Cushing 215.

Under this rule the indictment must charge knowledge of the mailing and knowledge of the fact which renders the act of mailing criminal. Does that happen in this indictment when read in the ordinary meaning of the words employed: "Did knowingly deposit * * * for "mailing and delivery a letter and circular giving informa-
"tion where * * * a certain obscene, lewd, and "lascivious book and publication of an indecent character "entitled 'Stolen Sweets' might be obtained * * ?" Might a man not do everything here charged and still not know that the book "Stolen Sweets" was of the kind declared? If so, the indictment is clearly bad for that reason.

"On the other hand, if the allegation is that the "defendant simply did a thing, which in its nature might as "well flow from a pure mind as a corrupt one, this is not an "averment of crime. To make it such, words expressive of "the evil of the intent must be added. These are the propo-

" sitions of reason out of which the specific adjudications " should be eliminated."

1 Bish on Crim. proc. § 526.

It would not be criminal to knowingly deposit for mailing a circular not obscene in itself, which gave information where an obscene book could be found, unless the depositor knew that the book mentioned in the circular was obscene, and there is manifestly nothing in the act of knowingly depositing in the mail such a circular, giving such information, which would include of necessity, nor in reason, knowledge of the additional fact of the nature of the book advertised.

A question similar to the one here has been passed upon in the District Court, where the charge was that the defendant knowingly deposited matter in itself obscene.

In *U. S.* v. *Slenker*, 32 Fed. Rep. 694, PAUL J., said: " Let us apply this rule to the case now before us. The defendant is charged with knowingly depositing, for mailing and delivery, certain obscene papers, etc. She may knowingly have done this; she may have knowingly caused this to be done, and yet be entirely ignorant of the obscene character of the writing so deposited, and consequently not guilty of the offense described in the statute. Knowingly in the indictment must be limited to the *act* of depositing for mailing and delivery, the obscene matter in the mail, and can not be extended to include a guilty knowledge of the writings, papers, etc."

This view of Judge PAUL is directly sustained by the authority of *Commonwealth* v. *Boynton* (12 Cushing, 499). In this case it was charged, in the language of the statute, that the defendant " did knowingly sell to one " Jeremiah Barker a certain piece of diseased, corrupted

" and unwholesome provisions, to wit, one hind leg of " veal." The judgment was arrested by the Massachusetts Supreme Court, against Rufus Choate's argument, upon the single ground *that the allegation did not amount to a charge of knowledge that the meat sold was diseased*, &c. The court, BIGELOW, J., saying: " It is a familiar rule of " criminal pleading that wherever the intention of a party " is necessary to constitute an offense, such intent must " be alleged in every material part of the description where " it so constitutes it; thus, where a forged order was pre- " sented and money obtained thereby, and the indictment " alleged that the defendant, with intent to cheat know- " ingly, pretended it to be genuine, but did not aver the " obtaining money thereby to have been knowingly done, " it was held bad. (Citing) 1 Chit. Cr. Law, 232, 233; " *Rex* v. *Rushworth*, 1 Stark, R. 396, and *Russ* v. *Ry.*, " 317; *Com.* v. *Slack*, 19 Pick. 304."

Opposed to the case by Judge PAUL is *U. S.* v. *Clark*, 37 Fed. Rep. 106, where Mr. Justice BREWER took a different view upon precisely the same question, saying: " Doubtless the question turns largely on " whether the word 'knowingly,' as used in the statute and " in the indictment, qualifies the adjacent verb 'deposit,' " or the whole matter described. It may be conceded " that ordinarily an adverb may be understood as qualify- " ing its adjacent verb, and yet that is not always true; " and in construing words and sentences used in an indict- " ment we are to give them their ordinary significance, in " the absence of some technical construction necessarily " imposed upon them. Now it is a familiar use of the " adverb knowingly that it qualifies both its adjacent verb " and the full act thereafter described. I say a party " knowingly told a lie. Every one understands that I

" mean that the party has stated what he knew to be a lie. " And in the same way, when I say that a party know- " ingly deposited an obscene picture, no one supposes " that I mean that he simply deposited a picture, the char- " acter of which he was ignorant of. All understand that " I mean to say that he has deposited that which he knew " to be obscene, and this because the adverb knowingly " used in sentences of this kind, by the common under- " standing of all, goes beyond the mere verb and includes " broadly all that is expressed in the full act charged to " have been done."

While the writer cannot agree that Mr. Justice BREWER'S illustration is a fair one—for to say that " a party told a lie " alone implies the declaring of a known falsehood, and is not enlarged at all by the qualifying adverb " knowingly "— still it is not necessary for the determination of the question in this case to take issue on any of the reasoning of the case last cited.

The principle announced by Mr. Justice BREWER goes no further than that the adverb " goes beyond the " mere verb, and includes broadly all that is expressed in " the full act charged to have been done "

Let us go as far as Mr. Justice BREWER does, and admit the charge " that a person knowingly deposited in the mail an obscene book " means all that it says. We are not required to say the charge " that a person know- " ingly deposited in the mail a circular giving information " where an obscene book could be obtained " means any more than it says, or that the adverb goes to the further fact that the person knows that the book is or is not obscene.

II.

The court below erred in admitting secondary evidence of the following letter (*Record, p. 11*).

" O'FALLON, Ill., December 27, 1891.
" George E. Wilson, Publisher,
" 415 Dearborn Street, Chicago, Ills.
" DEAR SIR—Please send me a list of your publications
" suitable for private reading.
" Yours truly,
" JOHN HOBART."

The objection to the admissibility of this letter is here placed upon the ground of incompetency. It nowhere appearing that plaintiff in error ever had it in his possession, or ever saw it (*Record, p. 12*). If the original letter was incompetent, certainly secondary evidence of it was also incompetent.

The testimony shows that on December 27th, 1891, Mr. McAfee, assuming the name of John Hobart, wrote this letter and addressed the same to plaintiff in error at his place of business in Chicago, and it was delivered by the witness Seavey, a letter-carrier, to Miss Ida Wilson on December 29th. (*Record, p. 14.*) And the circulars which were sent to John Hobart at O'Fallon are considered as the result of the request in that letter of Mr. McAfee.

At the adjournment of court for the noon recess a notice was served by the government upon counsel for the plaintiff in error to produce said letter, and at the coming in of court at 2 o'clock the court, upon plaintiff in error saying that he knew nothing of the letter, admitted secondary evidence of it over objection. (*Record, p. 11.*)

In order to make this letter competent evidence the

facts concerning it must bring it within the well-known rule announced in the following authorities:

" * * * Letters of third parties are inadmissible " when heresay, hence a letter addressed to a party cannot " be admitted as proof against him unless it is proved that " he received it or acted on it, or in some way invited it."

Wharton's Crim. Ev. 19th Ed. § 644.

" A letter addressed to a person which he has not read cannot be admitted to affect him in any way."

Com. v. *Edgerly*, 10 Allen, 184.

" Letters addressed to an individual and received by " him are not to have the same effect as verbal communi- " cations. Silence, in the latter case, may authorize the " inference of an assent to the statement made, but not " equally so in the case of a letter received but never " answered, or acted upon. So far as these letters might " have been shown by other proof to have been acted " upon or sanctioned by the defendants, so far they would " have been competent evidence."

Com. v. *Eastman*, 1 Cushing, 215.

" The fact that an unanswered letter or other paper is " found in the custody of a party, but not acknowledged " by him, is not ground for the admission of the paper as " evidence against him."

Wharton's Crim. Ev. (9th ed.), § 682.
U. S. v. *Crandall*, 4 Cranch C. C. 683.
People v. *Green*, 1 Parker Crim. R. 11.
Dutton v. *Woodman*, 9 Cush. 262.

It was insisted that the letter had been delivered to plaintiff in error's employé at his place of business. That in response to it the business circulars of plaintiff in error, enclosed in an envelope bearing his return card, had been received, and that this was enough to warrant the presumption that the letter reached him, and it was therefore competent evidence against him. If this was all there was of the case regarding this letter, the theory of "presumption" upon which the court below acted might be legitimately invoked to the desired end, "But presumptions are indulged "to supply the place of facts; they are never allowed "against ascertained and established facts. When these "appear, presumptions disappear."

Lincoln v. *French*, 105 U. S. 614.

Miss Wilson was called as a witness by the government. She received the letter sent by Mr. McAfee. She answered it, as she testifies, without any consultation with plaintiff in error. Here was a witness produced by the government who knew all about the letter in question and whose testimony shows that plaintiff in error never saw it, and never had any control of it. (*Record, p. 9.*) Why did the government not ask this witness to produce the letter or to tell what had become of it? When it is established by the government's own testimony that plaintiff in error never heard of the original of this letter until Mr. McAfee told about it on the witness stand, it is not apparent what principle of evidence, applicable to a criminal case, can be invoked to give the copy of the letter to the jury over his objection.

Why should plaintiff in error be obliged to run the gantlet of the religious prejudice of the average jury because his clerk, without instruction or suggestion from him,

had suggested Paine's theological works, and Ingersoll's abuse of Christianity, as proper subjects for *private* reading.

The sole object of putting this letter in evidence, aside from invoking religious prejudice, was to set the jury guessing as to what terrible literature John Hobart, *alias* Mr. McAfee, wanted, which he was obliged to label "private." And procure the triers to assume that the kind of literature handled by plaintiff in error was understood in his establishment, to be of a kind that must be kept *sub rosa*.

The jury, by the permission of the court, treated plaintiff in error as bound by the suggestive language of John Hobart, *alias* Mr. McAfee, in this communication, but, under the circumstances, the law does not hold him to any such accountability. Therefore this action of the court below was error clearly to plaintiff in error's prejudice.

III.

THE COURT BELOW ERRED IN PERMITTING THE DISTRICT ATTORNEY TO REFER TO THE FACT THAT PLAINTIFF IN ERROR HAD NOT TESTIFIED.

Plaintiff in error is a book-seller and publisher. That the books in question were contraband matter under any system of law (a matter which will receive more attention hereafter) never entered his mind until indicted. While the government would probably be able to show these books advertised through the mail by every book-publisher in the country, if they could not prove it in the instances alleged in their pleading, there was nothing to bother about. The government did not attempt to show

a mailing by plaintiff in error, but attempted to establish that somebody had done the act, and that plaintiff in error was responsible for it.

Miss Wilson, who could not be restrained by the warnings of counsel not to implicate herself, frankly stated that she prepared the John Hobart envelope and circulars, but declared that she did not know the handwriting on the Jack Horner envelope; that it was not her brother's, is thus rendered very clear. In order to convict plaintiff in error, the government is obliged to maintain the theory that plaintiff in error is responsible for the act of some clerk, whether the clerk acted under instructions or not, for there is no attempt to show that plaintiff in error ever suggested the mailing of a circular by any one, or that he knew or suspected that anybody in his employ was using the mails to advertise any book in his stock.

Plaintiff in error undoubtedly knew the handwriting of the clerk who sent the "Jack Horner" circulars, and to take the stand he would have had to furnish Mr. McAfee the name of another victim. He preferred to exercise the right which the statute gives him of remaining mute.

In his closing argument the district attorney paid his respects to plaintiff in error, as follows:

"They say Wilson is a man of good character. It is "a grand thing for a young man in Chicago to be the son "of an honest man, because blood will tell. If the father "is honest the chances are the son will be honest too. Men "live all their lives to build up a good character, because it "is a shield against the attack of infamy. They called two "or three witnesses here who testified to this young man's "character as being good, so far as they knew. But I "want to say to you, gentlemen of the jury, that if I am "ever am charged with crime, I will not stop by putting

" witnesses on the stand to testify to my good character, " but I will go upon the stand and hold my hand before " high Heaven and testify to my innocence of the crime." (*Record, p. 21.*)

Here counsel for plaintiff in error called the court's attention to the language of the district attorney and asked to be allowed an exception to it, and the court remarked:

" Yes, I suppose the counsel should not comment " upon the defendant not taking the stand. While the " United States Court is not governed by the State statute, " I do not know that it ought to be the subject of com- " ments by counsel." (*Record, p. 21.*)

Then the district attorney, having done all the harm possible, proceeds to clinch the matter and make its effect sure in the following language:

" I did not mean to refer to it in that light, and I do " not intend to refer in a single word to the fact that he " did not testify in his own behalf." (*Record, p. 21*).

The court said nothing and counsel for plaintiff in error took another exception. (*Record, p. 21*).

The act of March 16, 1878 (20 Stat. L. 30, 1 Sup. 155) provides: " That in the trial of all indictments in " formations, complaints and other proceedings against " persons charged with the commission of crimes, offenses " and misdemeanors, in the United States courts, territo- " rial courts, and courts martial, and courts of inquiry, in " any State or Territory, including the District of Colum- " bia, the person so charged shall, at his own request, but " not otherwise, be a competent witness, and his failure to " make such request shall not create any presumption " against him."

Every practitioner in a jurisdiction where a similar statute to this exists appreciates the difficulty of dealing

with it. In a close case, where the jury may feel warranted in finding either way, the failure of the defend ant to add his declaration of innocence to the testimony may throw the verdict against him. Again, if he is an ordinary person unused to public speaking, unnerved and broken by the strain put upon him of several months uncertainty concerning an impending trial, and with all the terror that judicial proceedings usually inspire in the man who is for the first time brought to trial upon a criminal charge, the chances are all in favor of his appearance upon the witness-stand under cross-examination being so much against him that court and jury alike will disbelieve his statements, and lose sight of the real issue in the case in a desire to punish one whom they consider has tried to deceive and mislead them.

It is because there are scores of reasons besides guilt, that may move the counsel for a defendant on trial to keep him from taking the stand; that these statutes, without exception, provide in more or less forcible language, that the neglect of the defendant to testify shall not create any presumption against him. Although the statute of Illinois has an additional clause to the Federal act, still the exact language of the Federal act as found in the Illinois law has been considered by the Supreme Court of that State, in *Austin* v. *The People*, 102 Ill. 261.

This was a prosecution for rape, and in reply to Lord *Hale's* language about the care to be exercised by juries in such cases, quoted in argument by defendant's counsel, the State's attorney, in his closing argument, said the language of Lord *Hale* no longer applied because "now the defendant had the right to testify in his own behalf." In reversing the case, Mr. Justice DICKEY said: "The letter and spirit of this statute were both

"obviously violated in these proceedings. When the "statute says that *no presumption* against the accused "shall be created by his neglect to testify, it clearly meant "that in cases where the defendant should not choose to "avail himself of the privilege offered by the statute, the "trial should be conducted in the same manner and upon "the same presumptions as if the statute had not been "passed;" and further on in the opinion it is said: "We "do not see how this statute can be completely enforced, "unless it be applied as a rule of practice, that such im-"proper and forbidden reference by counsel for the pros-"ecution shall be regarded as good ground for a new "trial in all cases where the proofs of guilt are not so "clear and conclusive that the court can say affirmatively "the accused could not have been harmed from that "cause."

How can the right of the defendant under this provision of the statute be protected, if the district attorney in his closing argument is permitted to comment upon the fact and the trial judge say in the presence of the jury, as in this case, that he "does not know whether it ought to be the subject of comment?"

It is respectfully urged, as an elementary proposition, that nothing is proper subject of comment by counsel in any case except such matter as is proper subject of consideration by the jury. And upon every reason of justice and numerous authorities, it is urged that when a prosecuting officer, in his closing argument, is permitted by the court to get before the jury matter not proper for its consideration, that such is error, and if of such a nature

that it *might* incline the jury against the defendant, the judgment will be reversed.

Rolfe v. *Inhabitants of Rumford*, 66 Me. 562.
Union Cent. Life Ins. Co. v. *Cherever*, 36 Ohio St. 201.
Thompson v. *State*, 43 Tex. 273.
State v. *Smith*, 75 N. C. 307.
Hoxie v. *Home Ins. Co.*, 33 Conn. 471.
Brown v. *Swineford*, 44 Wis. 282.
State v. *Lee*, 66 Mo. 167.
State v. *Foley*, 12 Mo. App. Rep. 433.
People v. *Mitchell*, 62 Cal. 411.
Ferguson v. *State*, 49 Ind. 33.
Cross v. *State*, 68 Ala. 477.
Flint v. *Com.* 81 Ky. 187.

The language of the Illinois statute is: "Provided, "however, that a defendant in any criminal case or pro- "ceeding shall only, at his own request, be deemed a com- "petent witness, and his neglect to testify shall not create "any presumption against him, nor shall the court permit "any reference or comment to be made upon or to such "neglect."

In *Baker* v. *The People*, 105 Ill. 452, one defendant went on the stand and the other did not, and the Supreme Court reversed the judgment against the latter defendant simply because it considered an instruction referring to the competency of the defendant who did testify, as a covert attempt to call the attention of the jury to the fact that the other did not do so.

In *Angelo* v. *The People*, 96 Ill. 209, the judgment was reversed solely because the State's attorney, in his

closing argument, had referred to the fact that the defendant did not appear on the witness stand.

Mr. JUSTICE MULKEY, in reversing another and later case where the State's attorney had told the jury that the defendant could have testified if he wished, said :

"There is not a mitigating circumstance in this case, "if, indeed, there could be such a thing, that was not in "the others. It is true the court, upon the objection "being made, stopped counsel, and told the jury that his "remarks were improper; and this, together with the "claim that the remarks were unthoughtfully made in the "heat of discussion, is all that is urged in palliation of the "positive violation of the statute. How much did it avail "for the court to tell the jury that the remarks of counsel "were improper? His words had found a lodgment in the "minds of the jury, spent their force and subserved the "purpose for which they were uttered, and it were idle to "talk about removing their effect upon the jury by a mere "declaration from the court that they were improper. As "well might one attempt to brush off with the hand a "stain of ink from a piece of white linen. One, in the "very nature of things, is just as impossible as the other."

Quinn v. *The People*, 123 Ill. 347.

In conclusion, on this subject the attention of the court is directed to the outspoken denunciation by the justices of the Supreme Court of Illinois, of such conduct by public prosecutors, and the uniform reversal of the judgments tainted with such error, even where the trial court had sharply and promptly rebuked the people's counsel, as in noticeable contrast with the conduct of the district judge, who not only did not rebuke, but "did not know" whether it was proper for the district attorney to violate this statute or

not, and left the jury to consider the language of the district attorney as a legitimate part of the case.

IV.

The court was asked, and refused, to charge the jury as follows: "That if the jury believe from the evidence "that the only offense against the United States com- "mitted by the defendant was committed solely at the "instigation and solicitation of the witness, Robert Mc- "Afee, the jury should find the defendant not guilty." (*Record, 22.*)

It is claimed that under the evidence in this case the jury would have been warranted in finding that Mr. McAfee was employed by the government as a decoy to procure individuals to violate its postal laws, to the end that the government and Mr. McAfee might profit by the penalties. If the jury would have been warranted in finding such facts from the evidence, then the case is within the rule laid down by Mr. Wharton, as follows:

"The employment by the government of a detective "in the guise of a confederate does not preclude a prose- "cution in cases where the detective does not make him- "self an apparent principal in the crime. A distinction is "made between the detective and the decoy. The de- "tective discloses, it may be often by the agency of the "criminals themselves, who are led to expose themselves "unguardedly, a crime already concocted; *the decoy sug- "gests the crime and is herein its originator.* It is true "that all detectives are in one sense decoys, and all decoys "in one sense detectives. But when the decoy ceases to "be a detective, and becomes the apparent originator of "the crime, then one of two consequences follows. If he "was not employed by the government, then he becomes

"a co conspirator, liable to the same punishment as his "associates. * * If, on the other hand, he was em- "ployed by the government to cause the offense to be "committed, the government is precluded from asking that "the offenders thus decoyed be convicted. They are as- "sociates with the government in the commission of the "crime, and the offense being joint, the prosecution must "fail. If that which one principal does is not a crime, the "other principal cannot be convicted for aiding him."

1 Wharton's Crim. Law (9th ed.), sec. 149, subdivision 2.

In subdivision 4 of the same section, the author draws the distinction more clearly by showing that the cases where detectives have been permitted to assume the character of decoys are limited to those where the criminal plan has already been formed, and where the work of the detective only operates to obtain evidence of an act pursuant to such already formed plan.

What are the facts here? Mr. Wilson is in business in the State of Illinois. In that state the common law is in full force, and the possession or sale of obscene literature is not only an offense under that law, but also under section 223 of chapter 38 of the revised statutes of that State (the criminal code) which provides: "Whoever brings or "causes to be brought into this State, for sale or exhibi- "tion, or shall sell or offer to sell, or shall give away or "offer to give away, or have in his possession, with or with- "out intent to sell or give away, any obscene and indecent "book, pamphlet, etc., * * or shall advertise the same for "sale, * * * or shall give information orally where the same "may be obtained, may be imprisoned not more than six "months and fined not less than $100."

Mr. McAfee lives in Illinois. (*Record*, 7.) He is acquainted with its laws, and knows that one-half of the fine provided for in this act, pursuant to the act, goes to the informer. But Mr. McAfee knows that the people of the State of Illinois, and their conservators of the public peace, do not consider such books as Mr. Wilson sells within the letter or spirit of the State law. Grand juries will not indict, or States' attorneys prosecute their neighbor for having in his possession or attempting to sell "Don Juan," or a coarse prose rehash of many of its situations, like "Stolen Sweets." The public, used to the stories from real life told in the columns of the Chicago *Times*, *Tribune* and *Inter Ocean*, find nothing shocking in the escapades of the Lothario of De Maupassant's great satire on the Parisian newspaper writer, familiar to every reader of fiction, in "Bel-Ami," and the same public would find very tame reading in the adventures of Théophile Gautier's unknown tramp, "Mademoiselle De Maupin," compared with the *Daily News'* Saturday afternoon report of the call of the default divorce calendar. The agent of the Western Society for the Suppression of Vice, would never be able to get part of a fine or an allowance of witness fees in an Illinois court, by prosecuting a book-dealer for selling "Mysteries of the Court of London," when the grand jury learned that it had been on sale in every publishing-house in England for forty years, and had been standard "penny dreadful" literature in this country for a quarter of a century. (The suggestions here made are not overdrawn. On the trial of this case there was produced in court a copy of the finding list of the Chicago Public Library for 1892, showing that DeMaupassant's novel, "Bel-Ami," was in that institution for circulation, and a copy of the "Mysteries of the

Court of London," being one of the weekly editions of the Brookside Library, published by Frank Tousey, in Philadelphia, in 1875, and entered as second-class matter in the postoffice, was also produced, and the copy of "De Maupin" offered in evidence, recites, that it was entered at the Chicago postoffice in February, 1891, as second-class matter). Mr. McAfee, knowing these things, drops his philanthropic character as a suppresser of vice, and assumes his other office of government inspector, specially commissioned to destroy book-sellers. Mr. McAfee proceeds to get Mr. Wilson to commit a violation of the Federal Postal Laws, no matter how technical the violation—the least is enough, for the federal machinery is so highly charged with moral atmosphere that it is sensitive to the least degree.

Mr. McAfee begins by writing a letter asking for a list of books. But, argues Mr. McAfee with his conscience, and the District Judge with the jury, Mr. McAfee did not ask Mr Wilson to use the mail in reply. It is respectfully submitted, that is a question for the jury. When Mr. Wilson's clerk received a letter from Mr. McAfee requesting a reply which everybody would make by mail, if at all, how would the clerk suppose Mr. McAfee wanted the reply sent? What would the jury have said as to this?

Again, Mr. McAfee has been at this business too long, as can be learned from the numerous cases found in the Federal Reporter, to ask, directly, an intended victim to send obscene matter through the mail. If the publisher sends obscene matter in reply to an innocent letter that is the publisher's affair, according to the District Judge and Mr. McAfee. Again, we say, that is a question for the jury. Mr. McAfee learned, as he says from adver-

tisements of Mr. Wilson (*Rec.* 7), that the latter was advertising and selling books in Illinois that were probably objectionable to the postal laws. Mr. Wilson had committed no crime against the United States, even if his books and advertisements were obscene within the meaning of the laws of Illinois; and so far as Mr. McAfee could discover, Mr. Wilson did not contemplate any crime against the United States. Was the jury not warranted in finding that when Mr. McAfee went about procuring Mr. Wilson's clerk to send him an envelope through the mails containing circulars which McAfee knew contained criminal matter, and the clerk, if he knew the matter, was bound to know it was criminal, that in that case McAfee instigated, solicited and procured the crime against the government?

In *U. S.* v. *Kaltmeyer*, *supra*, Judge McCRARY, in sustaining a motion to exclude the evidence, for want of sufficiency of description in the indictment, took occasion to say of a further reason urged by defendant for the same object:

"The second question discussed is whether decoy "letters used not to detect a crime already committed, "but to induce a party to commit a crime, can be offered "in evidence at all. * * * The offense here is send- "ing such matter through the mails, and that offense was "not committed until it was invited by the decoy letter. "It is no doubt true that when a crime has been com- "mitted, or you suspect somebody of having committed "it, you may employ that method for the purpose of "entrapping the offender. But if it has not been com- "mitted, the question is whether you can entrap a man "into the commission of it by that method. It may by "true that, if you suspect that somebody has a disposition "to commit a crime, you may write him a letter to induce

" him to commit it and then offer that letter as evidence " against him. When the question arises we will decide it."

Article 307 of the Criminal Code of Texas provided: " If any person shall offer to bribe any sheriff, etc., to " permit any prisoner in his custody to escape, he shall be " punished, etc."

The evidence shows that one Allen, a deputy sheriff, had negotiated with the defendant, with the result that defendant had made a direct offer to Allen for the release of a prisoner. The theory of the prosecution was that Allen was working to trap defendant. The court held: " Where the officer first suggests his willingness to a per- " son to accept a bribe to release a prisoner in his charge, " and thereby originates the criminal intent, and appar- " ently joins the defendant in a criminal act first suggested " by the officer merely to entrap the defendant, the case " is not within the spirit of the article."

O'Brien v. *State*, 6 Tex. App. 665.

In reversing and remanding *Saunders* v. *People*, 38 Mich. 218, MARSTON, J., said:

" Some courts have gone a great way in giving en- " couragement to detectives, in some very questionable " methods adopted by them to discover the guilt of crim- " inals; but they have not yet gone so far, and I trust " never will, as to lend aid or encouragement to officers " who may, under a mistaken sense of duty, encourage " and assist parties to commit crime, in order that they " may arrest and have them punished for so doing."

And Chief Justice CAMPBELL, evidently not willing to let such official misconduct appear in the report without placing his own opinion of record, added: " I concur " with my brethren, Judges Cooley and Marston, in their " views of this case. Assuming that there is not in the

" record full evidence of such an invitation to enter the " clerk's office as would conclusively show there was no " breaking, the encouragement of criminals to induce them " to commit crimes, in order to get up a prosecution against " them, is scandalous and reprehensible."

The question raised by this instruction has been too often confounded with a similar question raised in cases where the trap was merely set by a detective in the government employ, but no effort made by the officer to influence the defendant's act, as in the cases of *U. S.* v. *Dorsey* (40 Fed. Rep. 752), and *U. S.* v. *Mathews*, before Mr. Justice HARLAN (35 Fed. Rep. 890). Each of these were cases of letter-stealing, where the government agent did nothing to bring about the commission of the crime. There has also been an attempt to avoid the application of the rule by refusing to recognize facts which the jury might have considered. Such was the position taken by the court in a well-known case, where Mr. McAfee had procured the defendant to violate the law. The court said:

" If a letter gives information where obscene books or pictures can be obtained, it is an offense to deposit such letter in the mail with intent to give such information, and thereby to aid in the distribution of such books and pictures, even though the party addressed happens to be an official: and, if such act is done voluntarily and intentionally—that is to say, if the non-mailable letter is deposited in the mail by the accused without solicitation on the part of the officer that the mail be used to convey such intelligence—the weight of the judicial opinion seems to be that the act does not lose its criminal character, though the offense may have been committed in responding to an inquiry from a person in the

government service, which was made under an assumed name for the purpose of concealing his identity."

Thayer, J. in U.S. v. *Grimm*, 50 Fed. Rep. 529.

The vice in Judge THAYER'S opinion above is found in the closing lines: "The act done does not lose its "criminal character, though the offense may have been "committed in responding to an inquiry from a person "in the government service which was made under an "assumed name for the purpose of concealing his "identity." No one will deny the correctness of the abstract proposition contained in these words, for "person in the government's service" may be a janitor, or deputy marshal, or marine. And he *may* use an assumed name for the purpose of concealing his identity. But suppose it is admitted, as in this case, that "the person" is a duly commissioned postoffice inspector, and the jury should find that his object in writing under an assumed name was to procure a technical violation of the postal laws to be committed so that he could arrest and prosecute somebody, otherwise entirely innocent: would the cases be the same?

In *United States* v. *Moore*, 19 Fed. Rep. 39, a case where Mr. McAfee procured the defendant to mail inhibited matter, Judge BLODGETT passed upon this question in the light of an offense procured to be committed by an individual merely, and did not discuss the subject of the decoy being a government agent.

United States v. *Bate*, 10 Fed. Rep. 92, is also a case where Mr. McAfee procured the defendant to step in the way of the postal laws. In this case the late Judge DRUMMOND reviewed a sentence by Judge BLODGETT, and when the question here raised was suggested, disposes of

it as a mere communication by a fictitious person. There is a note to this case by Mr. Wharton, in which he says:

"Whether, when the offense is the special product of the trap, the defendant can be convicted, depends upon the exclusiveness of the casual relationship between the offense and the trap. When the defendant was the passive tool of the entrapping party then there should be an acquittal. On the other hand, the defendant ought not to escape conviction in any case (with the exceptions above given) in which he knowingly committed the offense. The most frequent cases under this head are prosecutions for illicit sales of liquor. In an English trial in 1881 (*Rex* v. *Titley*, see London Law Times, July 30, 1881) a conviction of this class, when the sale was induced by the adroitness of a detective, was sustained, though it became subsequently the subject of much discussion in the House of Commons. In Scotland (*Blaikie* v. *Linton*, 18 Scottish L. R. 583) a similar conviction in 1881 was set aside by the court of judiciary on the ground that the offense was the product of the solicitation. But this can only hold good in cases in which the offender's action is not imputable to his free agency."

In *United States* v. *Slenker*, *supra*, Mr. McAfee again appears in his usual role, and the subject of his conduct was treated by PAUL, J., simply as a matter affecting his credibility, in the following instruction: "That the detec-
" tion of crime by means of test or decoy letters is allow-
" able under the law; that the witnesses Barclay and
" McAfee were justifiable in resorting to this means to dis-
" cover violations of the postal laws, and their testimony
" is not to be discredited because they have resorted to this

" frequent, and frequently indispensable mode of *detecting* " crime."

Again appears the same failure to draw a distinction between the detection and the creation of crime. .

United States v. *Whittier*, 5 Dillon, 35. The circuit judge went very fully into the subject of decoy letters as used in that case by the same Mr. McAfee, and after saying, " In order to prevent misconception of the de- " cision now made it may be proper to add, that we only " decide the narrow and single point that the letter writ- " ten and deposited by the defendant did not give the pro- " hibited information and hence is not within the statute." He said: " We do not decide that decoy letters can not " be used to *detect* persons *engaged* or *suspected to be en-* " *gaged* in violating criminal laws, but recognize the doc- " trine that such letters may be *so used.*" *Quære*—in all cases ?

Judge TREAT, however, in the same case says:

" No case, after most diligent search, has been found " which disposes exactly of the point under consideration. " In my judgment, it must be settled in the light of ele- " mental principles.

" No court should, even to aid in detecting a sup- " posed offender, lend its countenance to a violation of " positive law, or to contrivances for inducing a person to " commit a crime. Although a violation of law by one " person in order to detect an offender will not excuse the " latter, or be available to him as a defense, yet resort to " unlawful means is not to be encouraged. *When the* " *guilty intent to commit has been formed, any one may* " *furnish opportunities, or even lend assistance, to the* " *criminal, with the commendable purpose of exposing and* " *punishing him. But no case has been found which goes*

"*beyond these views.* There are legitimate means and "jurisdictions where offenses can be tried and punished, "and the public weal is best subserved where rigid ad- "herence thereto is enforced."

United States v. *Wright*, 38 Fed. Rep. 106, was a case of the stealing of a test letter. BROWN, J., went over the cases of decoy letters, saying: "On principle there is a "clear distinction between artifices used to *detect* persons "suspected of being engaged in criminal practices and "means used to *tempt* them to adopt such practices."

It will be seen from the cases cited, that the history of the prosecutions under the so-called Comstock law, as shown by the reports of the District and Circuit Courts, is something that the citizen will take little pride in when understood. That the United States, in enforcing laws relating to the morals, literary taste and education of the people, regardless of the customs and practical construction of the laws of the States in which they live, should be obliged to hire spies and informers in almost every case would not be surprising, but rather to be expected. But that the government, after embarking in this dubious policy, should turn the enforcement of it over to the agents of a private society, and, by appointing these agents government postoffice inspectors, invest them with a power enjoyed by no other civil service officer on earth, and that these officers should, in every case where one of them has appeared, as shown by the books, *have instigated the act for which the government asked the conviction*, is a record that some day even the members of the society will wish blotted out for the sake of the national honor.

The government has vested in Mr. McAfee absolute discretion as to the way he shall conduct this business (*Record, p. 13*), and it must, in law and morals, shoulder

the responsibility for his work. And where the evidence is such that a jury *may* find that the only offense committed by a defendant was brought about by the instigation of the government's agent, having full discretion in that behalf, it is submitted that the law is strong enough to defeat the scheme, and the jury should be charged to that effect when requested.

C. STUART BEATTIE,
For Plaintiff in Error.

Office Supreme Court U. S.
FILED.
APR 6 1893
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

GEORGE E. WILSON, PLAINTIFF IN error,
vs.
THE UNITED STATES.
} No. 1284.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR DEFENDANT IN ERROR.

A. X. PARKER,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

GEORGE E. WILSON, PLAINTIFF IN error,
vs.
THE UNITED STATES.
No. 1284.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

By an indictment filed October 8, 1892, in the district court of the United States for the northern district of Illinois, northern division, it was charged (Rec., p. 1) that the plaintiff in error, on the 25th day of April, 1892, at Chicago—

> Unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States at Chicago aforesaid, for mailing and delivery, a let-

> ter and circular giving information where, how, of whom, and by what means a certain obscene, lewd, and lascivious book, and publication of an indecent character, entitled "Stolen Sweets," might be obtained, which said letter and circular was then and there directed to one "Jack Horner, Collinsville, Ill., care Vandalia line."

By five other counts in the indictment said plaintiff is charged with five other similar offenses. In count 2 it is charged that the "letter and circular" was directed to Jack Horner, and in the four succeeding counts, respectively, it is charged that the "letter and circular" was directed to one "John Hobart, O'Fallon, Ill.;" several different books of alleged obscene character being specified in the respective counts (pp. 1 to 3).

November 28, the counsel for the defendant below moved to quash the indictment upon four several grounds (p. 6). After hearing argument the court overruled the motion and an exception was taken to the ruling.

The said defendant was arraigned, pleaded not guilty, and was tried before Judge Bunn and a jury. (p. 5.)

The jury returned a sealed verdict, wherein they say:

> We, the jury, find the defendant guilty. (p. 5.)

A motion for a new trial was submitted and was overruled and an exception noted. (*Id.*)

Thereupon, on December 2, 1892, the defendant was sentenced to be imprisoned in the penitentiary at Joliet for the term of two years at hard labor.

Testimony taken upon the trial is set forth in the record, pages 7 to 22.

The defendant, Wilson, was a book-publisher doing business in and after February, 1892, at 312 State street, Chicago, and previously at No. 417 Dearborn street in said city.

The most important testimony given in the case (fols. 13, 20, 29, and 38) was given by one Robert McAfee, who was a post-office inspector holding a commission from the Government, and was also in the employ of the Western Society for the Suppression of Vice (7, 8).

This witness wrote to defendant, signing the names John Hobart and Jack Horner to his letters, asking for lists of his (Wilson's) publications, said names signed being both assumed names (11, 13).

In response to these requests, McAfee received envelopes addressed respectively to the names of John Hobart and Jack Horner, inclosing no written matter, but containing lists or circulars advertising publications, many of which are understood to be obscene publications.

Four books received by McAfee by express, addressed to "John Hobart, O'Fallon, Illinois," were put in evidence (p. 20).

It is manifest that they were sent in response to the letter of January 5, 1892, set forth on page 12 of the record, and, of course, are four of the books advertised by the respective circulars, upon which the counts of the indictment rest, sent out by Wilson in response to the Horner and Hobart letters.

That the books advertised by the circulars were "obscene, lewd, and lascivious," as charged in the indictment, does not appear to have been questioned. This is recognized

nd practically admitted by the defendant in omitting to assign any error in this connection.

The assignments of error are twenty, and appear to cover everything in the case except the selection of the jury and its verdict.

THE STATUTE.

The statute under which the indictment was found was section 3893 of the Revised Statutes, amended by the *Act of September* 26, 1888 (25 Stat. L., 496), to read as follows:

> SEC. 3893. *Every obscene, lewd, or lascivious book,* pamphlet, picture, paper, letter, writing, print, *or other publication of an indecent character,* and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, *and every written or printed card,* letter, *circular,* book, pamphlet, *advertisement or notice* of any kind *giving information, directly or indirectly, where or how, or of whom, or by what means, any of the hereinbefore-mentioned matters, articles, or things may be obtained* or made, whether sealed as first-class matter or not, *are hereby declared to be nonmailable matter,* and shall not be conveyed in the mails nor delivered from any post-office nor by any letter-carrier; *and anyone who shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable matter,* and any person who shall knowingly take the same, or cause the same to be taken from the mails for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same,

shall, for each and every offense, be fined upon conviction thereof not more than five thousand dollars, or imprisoned at hard labor not more than five years, or both, at the discretion of the court.

POINTS.

I.

THE INDICTMENT IS SUFFICIENT.

A.

It is unnecessary in this case to set out the obscene matter in extenso or in hæc verba.

It is manifest that to have set forth the circular, or the circulars, mailed, would have been valueless; and to have set forth the contents of the books called "Stolen Sweets," "Mysteries of the Court of London," "Bel Ami," and "Madamoiselle de Maupin," or substantial portions of said books, would have been wholly impracticable. The law will not require the performance of that which is impracticable and unnecessary.

The circulars, so far as important, are sufficiently described by being described as giving information where the respective books named might be obtained, and it was needless to recite to the person charged the contents of his books which he advertised. The cases hold that an obscene publication need not be spread at length upon the records of the court. Counsel for plaintiff admits and shows this to be the American law.

Can it be that an indictment is to be held bad after verdict because the same *does not set forth and explain the reason* that such matter is not spread before the court?

The courts have held that such matter is not necessary in an indictment; that the indictment is good without it.

If such indictments are good without such matter, do they become bad because the pleader does not insert a parenthetical note or clause explaining the grounds upon which he concluded to leave out the unnecessary matter?

As an indictment may be good which omits to set out the obscene matter, an explanatory clause as to its omission is but a matter of form, and is within the saving properties of section 1025 of the Revised Statutes.

Again, the indictment alleges that the book is "obscene, lewd, and lascivious;" it omits to set forth the obscenities *in hæc verba*.

The courts have established the law that obscene, lewd, and lascivious matter need not be set forth.

Can it be said that courts need to be told now that the pleader did not so set forth such matter because it was obscene?

The whole matter appeared upon the face of the indictment, and the court needed no further information from the pleader.

The testimony of Ida Wilson (p. 9) shows that the circulars sent were Wilson's. They are in the form of an "order blank," and request the recipient to order from defendant, or his firm, the sending of the book named.

It is plain that the defendant below was sufficiently informed by the indictment of the circulars and of the books; and that after trial for the offenses charged in the indictment there could be no danger of future prosecution for the same offenses.

It may be added, as to the circulars, that they were of vital importance only in so far as they advertised the books complained of, and to that extent the contents of the circulars appeared in the indictment in the naming of these books as advertised by the defendant charged.

The impracticability of setting forth the contents of a book in an indictment is recognized in *United States* v. *Kaltmeyer* (16 F. R., 761), as well as the fact that inconvenience may excuse an omission of the setting forth of the matter complained of.

The indictment in the case at bar is evidently based upon the case of *Bates* v. *United States* (10 F. R., 92), which authorizes and sustains it fully.

The case of *United States* v. *Mills* (7 Pet., 138) while not fully covering Bates's case evidently leads up to it.

The rule here contended for on behalf of the defendant in error is consistent with, and is practically supported by, the first division of the decision in *United States* v. *Grimm* (50 F. R., 529.)

B.

The indictment is sufficient in charging knowledge.

The obscenity of the book being charged it is necessarily to be inferred that the bookseller who advertised it knew of its obscenity

The statute provides that "anyone who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter," shall be subject to punishment.

The indictment charges that the defendant—

> Unlawfully did knowingly deposit * * * for mailing and delivery a letter and circular giving information where, how, of whom, and by what means a certain obscene, lewd, and lascivious book and publication of an indecent character, entitled "Stolen Sweets," might be obtained * * * against the peace * * * and contrary to the form of the statute.

The other counts are similar.

It is respectfully submitted that the indictment is sufficient in the particular now under consideration under the cases of *United States* v. *Chase* (27 F. R., 807), and *United States* v. *Clark* (37 F. R., 106).

II.

NO ERROR OCCURRED IN THE ADMISSION OF TESTIMONY.

The fifth, sixth, seventh, eighth, ninth, tenth, and thirteenth assignments of error relate to the proving of the letters sent by McAfee to the defendant by placing copies thereof in evidence.

The letters were three, and were as follows:

No. 1.

O'FALLON, ILLINOIS, *December* 27, 1891.

G. E. WILSON, *Publisher*,
315 *Dearborn Street*,
Chicago, Illinois:

DEAR SIR: Please send me list of your publications suitable for private reading.

Yours truly,

JOHN HOBART,
W. U. T. C.

No. 2.

O'FALLON, ILLINOIS, *January* 5, 1892.

G. E. WILSON & Co.,
415 *Dearborn street*,
Chicago, Illinois:

GENTLEMEN: Thanks for list of books just received. I send you $2 for the following: "Mysteries of the Court of London," "Bel-Ami," "Mademoiselle de Maupin," and "Stolen Sweets." I will undoubtedly want many on your list, and if you can allow me anything in discount you will oblige

Yours, truly,

JOHN HOBART.

No. 3.

COLLINSVILLE, ILLS., 4, 23, '92.

G. E. WILSON, Esq.,
314 *State street*,
Chicago, Ills.:

DEAR SIR: Some time since I received some books from you. Will thank you to send me list of your new books.

Address

JACK HORNER,
(C. O. the Vandalia Line).

No. 1 is the copy of a letter written by McAfee (f. 20). The envelope was postmarked "O'Fallon, Illinois," and, with the letter inclosed, was forwarded to the superintendent of free delivery at Chicago for special delivery to defendant (f. 13).

An answer thereto came to McAfee by way of an envelope bearing the Chicago post-office stamp, and the date

of "January 3, 1892, 2:30 p. m." Thereupon No. 2 was written and sent (f. 13). Letters Nos. 1 and 2 were postmarked at, and were then sent from St. Louis to the superintendent of free delivery at Chicago, to be placed in the hands of the carrier.

The carrier testifies to the receipt of this letter from Superintendent Householder, and to its delivery to Ida Wilson at defendant's place December 29, 1891, and that he made a memorandum of such delivery (f. 27).

No. 2 was written by McAfee after he received the circulars which came in response to No. 1, and was sent to defendant inclosed with $2 (f. 22). The books called for came to O'Fallan by express, addressed to John Hobart, indorsed "Printed matter, G. E. Wilson, publisher, 415 and 417 Dearborn street" (f. 13).

An envelope with a return indorsement, "Return to G. E. Wilson & Co., publishers and book dealers," etc., and addressed to John Hobart, came back to the O'Fallon post-office about January 4 (f. 15).

The address of this letter (to John Hobart) is shown to be in the handwriting of defendant's clerk, Ida Wilson (f. 16).

No. 2 was delivered to defendant's clerk, January 7th, at 1.30 p. m. (fol. 27).

No 3 was a letter inclosed in an envelope postmarked "Collinsville, Illinois," and was given by McAfee to a carrier to deliver to defendant (f. 24).

An envelope addressed to Jack Horner was received at Collinsville after April 25th, 1892, containing circulars which appear in evidence; this letter, so received, contained only printed matter and the envelope was post-

marked with the Chicago post-office stamp and bore the date of "April 25—9.30 p. m. 1892" (f. 14).

About April 25, 1892, between 12 and 1 o'clock, the carrier delivered to Ida Wilson, at defendant's place of business, a letter postmarked "Collinsville, Illinois," addressed to "G. E. Wilson, 314 State street, Chicago."

This carrier received this letter from the superintendent, and made a memorandum of its delivery (f. 26). The witness Irle bought books at Wilson's by using the envelope and circulars addressed to Horner and received by McAfee (fs. 27, 28). This letter (No. 2) is shown into the hands of the carrier (f. 39).

Notice to produce the originals of Nos. 1, 2, and 3 was given in writing (p. 11) at 1 o'clock p. m. November 30, and two hours before the copies were offered in evidence.

The court offered to delay receiving the secondary evidence until 10 o'clock the next morning if the defendant would then produce the originals. But counsel for defendant said defendant had no recollection of having received the letters.

No delay was asked for; no wish to make search for the originals was expressed, and no answer to or explanation of testimony tending to show that defendant did receive all three of the letters was attempted.

Under these circumstances, it is respectfully submitted, no error occurred by the receipt in evidence of these three exhibits.

The original of No. 1 would have been competent evidence in the case.

It was delivered to defendant's clerk at his place of business, it related to his business, it was occasioned by

his advertisement, it brought in response an envelope which bore the return card of defendant (f. 15) and was addressed by defendant's clerk (f. 16).

This letter was part of a transaction in which the unlawful mailing occurred and culminated in a sale of the objectionable books by defendant.

To assume that defendant's clerk, Ida Wilson, was guilty of the crime perpetrated under such circumstances, and that the principal, in whose interest and business the mailing was performed, was innocent, would be a reversal of the rules of law and lead to conclusions manifestly unjust.

The plaintiff in error, through his employé and agent, received the letter and answered it, and the same became competent evidence in the case arising out of the transaction. (*Bates* v. *U. S.*, 10 F. R., 92.)

III.

THE COURT BELOW COMMITTED NO ERROR IN RELATION TO THE COMMENTS MADE BY THE DISTRICT ATTORNEY AS TO THE EXAMINATION OF A DEFENDANT IN A CRIMINAL CASE, AND SUCH COMMENTS DO NOT REQUIRE THIS COURT TO GRANT A NEW TRIAL.

The district attorney, in his closing argument to the jury, referred to the value of a good character, and to the fact that two or three witnesses had testified to Wilson's character being good as far as they knew; he then added:

> But I want to say to you, gentlemen of the jury, that if I am ever charged with a crime I will not stop by putting witnesses on the stand to testify to my

> good character, but I will go upon the stand and hold up my hand before high heaven and testify to my innocence of the crime.

To which counsel for defendant duly excepted, and thereupon counsel for defendant called the attention of the court to the language used by the district attorney, and notified the court of an exception thereto, and the court said:

> Yes; I suppose the counsel should not comment upon the defendant not taking the stand. While the United States court is not governed by the States' statutes, I do not know that it ought to be the subject of comments of counsel.

And thereupon the assistant district attorney proceeded as follows:

> I did not mean to refer to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf.

To which counsel for defendant then and there again excepted. (Rec., p. 21.)

It is set forth at the end of folio 9 (p. 5) that the verdict was received.

> Whereupon the defendant moves the court for a new trial herein; which motion is heard and overruled; to which ruling the defendant excepts.

It is fair to infer that the point now under consideration was embraced in this motion, as it should have been if defendant relied upon it.

In such case the question is improperly here.

The statute (20 Stat. L., 30) provides that in the trial of indictments in the United States courts:

> The person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.

Two things appear:

First. If the defendant does not request to be made a witness he is not competent. In this case he did not become competent. In such a case he remains as though the statute had never been enacted; and any comment of an attorney would have the same force as though made in a case before any legislation anywhere had given the person charged the privilege of testifying in his own behalf.

Second. "His failure to make such request *shall not create any presumption against him.*"

The general subject of the legislation permitting persons accused in criminal proceedings to testify in their own behalf is elaborately presented in the fifteenth edition of *Greenleaf's Evidence* (Vol. 1, pp. 467–8, and Vol. 3, pp. 54 to 67.)

It is shown that in many States the enabling statutes provide that the circumstance of the failure of the person charged to request to be sworn *shall not be commented upon by the prosecuting attorney.*

This is the case in Illinois (3 Greenl., p. 56), Indiana and Iowa (*id.*, p. 57), Kansas (p. 58), Nebraska (p. 62), New Hampshire and Ohio (p. 63), Pennsylvania (p. 65), and Virginia (p. 66).

In Massachusetts the statute is substantially the same as that of the United States.

It is said (*id.*, p. 60) that even where the person charged is allowed to testify in his own behalf he is still carefully protected, and it is added:

> And while his counsel may comment to the jury upon the fact that no inference may be drawn against him for not testifying, the prosecuting attorney may not, in rebuttal of these comments, suggest that the reason of his not testifying was his guilt; (*b*) or comment in any way upon his nonappearance, but if he does, the defendant's counsel must seasonably object and ask the judge to instruct the jury to disregard the comment. He cannot require the judge to take the case from the jury. (*c*.)

and the cases of *Com.* v. *Scott* (123 Mass., 240) and *Com.* v. *Worcester* (141 Mass., 58), are referred to.

The cases cited in the brief of counsel for plaintiff in error relate to a statute differing essentially from the national enactment, and no case is found which would require a new trial in the case at bar.

The counsel for defendant below did not ask the court to give any directions or instructions to the jury in this connection, or to inform them that the omission of the defendant should not "*create any presumption* against him."

Counsel "notified the court" of the exception, and the court said:

> Yes, I suppose the counsel should not comment upon the defendant not taking the stand. * * * I do not know that it ought to be the subject of comments of counsel.

There is no ground given for any inference that the failure of Wilson to request to be made a witness in the case did create "any presumption against him" whatever.

The remarks made by the district attorney complained of are not of sufficient consequence to require this court to grant a new trial.

IV.

IT IS NOT TO BE HELD THAT M'AFEE IS THE CRIMINAL IN THIS CASE, AND THAT, THEREFORE, WILSON MAY EVADE THE STATUTE.

The fourth point urged on behalf of the plaintiff in error is that:

> The court was asked, and refused, to charge the jury as follows: "That if the jury believe from the evidence that the only offense against the United States committed by the defendant was committed solely at the instigation and solicitation of the witness, Robert McAfee, the jury should find the defendant not guilty." (Rec., 22.)

The first answer to this is, that from the evidence set forth in the case the jury had no legal right to believe or find that the only offense * * * was committed solely at the instigation and solicitation of McAfee.

Second. It is apparent that Wilson was engaged in the illicit book trade. McAfee was commissioned as an inspector but was employed by the Western Society for the Suppression of Vice.

McAfee says (fol. 13):

> I wrote him by reason of advertisements which I had seen.

The witness, Ida Wilson, testifies in November, 1892, that Wilson had a place of business at 312 State street "since February last," and that in January, 1892, he was at 417 Dearborn street. She says: "Defendant was running both stores;" he employed at least three assistants. He was a person "suspected of being engaged in criminal practices," and the letters were "used to detect [one] engaged or suspected to be engaged in violating criminal laws."

The letters sent by McAfee could not tempt a dealer engaged in lawful trade; they merely furnished the illicit trader an opportunity to disclose and develop his methods of business, and these, when so discovered, proved to be in violation of the statute.

That the writer of such a letter, becomes, because of writing it, a coconspirator with the criminal, or an associate in his crime, is a very bald assumption.

This assumption and those which appear in the concluding portions of the brief of plaintiff in error are offensive to the moral sense.

It will be remembered that Wilson was not solicited to answer by mail, he might have sent the circulars as he sent the books—by express.

This case is based upon the theory that the defendant was engaged in the business of selling obscene books and used the mails unlawfully in carrying on such business.

The offense charged is one against the public, "and it is no defense that the defendant having previously contemplated a violation of law is led to the particular wrong by a decoy."

Wharton's Criminal Law (par. 1449) citing *United States* v. *Foye* (1 Curtis, C. C. 364), and many other cases.

In a note to *Bates* v. *United States* (X. F. R., 97), Mr. Wharton presents the rules established by the decisions relating to decoys and solicitations of the character of those occurring in the case at bar as follows:

> 1. *Decoy solicitation.*—It is held to be no defense to an indictment under the statute for sending an obscene book by mail that the book was mailed actually to a detective who wrote for it soliciting it under a fictitious name, to which name it was addressed. A similar point was decided in the same way by *Benedict, J.*, in the *United States* v. *Bott* (11 Blatchf., 346); that learned judge holding it was no defense to an indictment for sending a powder designed to procure an abortion that the act was elicited by a decoy letter. It is true that we have a ruling from Judge Dillon (*United States* v. *Whittier*, 5 Dill., 35) that a sealed letter addressed to a decoy, and therefore not "giving information" in the sense of the statute, was not within the prohibition of the statute. But even supposing that Judge Dillon was right in this conclusion (as to which I may be permitted with all respect to that excellent jurist to express my doubts), the case is distinguishable from that now before us, which is that of sending an obscene book accompanied with drugs. The sending an obscene book, like that of sending a noxious drug, is made indictable by the statute without the qualification that it should give information, which is the condition applied to that section of the act under which the prosecution before Judge Dillon took place. The statute makes it indictable to send by mail any "obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character."

Now, if the indictment were for the publication of an obscene libel at common law no one would pretend that it would be a defense that the libel put in evidence on the trial had been sought for the express purpose of being put in evidence. That a sale to a party requesting the sale for this very purpose is an adequate publication has been repeatedly ruled (*Rex* v. *Burdett*, 4 B. & Al., 95; *Rex* v. *Wegener*, 2 Stark N. P., 245; *Brunswick* v. *Harmer*, 14 Q. B., 185; *Com.* v. *Blanding*, 3 Pick., 304; *State* v. *Avery*, 7 Conn., 268; *Hazleton Coal Co.* v. *Megargel*, 4 Barr., 324; *Swindle* v. *State*, 2 Yerg., 581). These rulings are in entire accordance with others in reference to other phases of crime. If I suspect, for instance, an employé of stealing money, I may mark money and have it exposed in such a way as to attract his attention, and if he steal it and be subsequently presented for larceny he can not defend on the ground that a trap was laid for him. (*Reg.* v. *Williams*, 1 C. & K., 195; *Rex* v. *Headge*, 2 Leach, 1033; R. & R., 160; *Reg.* v. *Egginton*, 2 B. & P., 509; 2 Leach, 915; *Rex* v. *Lawrence*, 4 Cox, C. C., 438; *Rex* v. *Johnson*, C. & M., 218; *Reg.* v. *Bannen*, 1 C. & K., 295; *U. S.* v. *Foye*, 1 Curt., 364; *Pigg* v. *State*; 43 Tex., 108. See *Alexander* v. *State*, 12 Tex., 540.)

* * * * *

The guilty party may be induced by a trap to offer the counterfeit coin, but this does not make the offering the counterfeit coin any the less indictable. (*Rex* v. *Holden*, R. R., 154; 2 Taunt., 334.)

Bates v. *United States* was decided in 1881; in 1892 the case of *United States* v. *Grimm* was decided (50 F. R., 528), and the law applicable fully covering this case was declared by Judge Thayer to be as follows:

3. The next inquiry is whether the act complained of—that is to say, the deposit of nonmailable letters

in the mail—loses its criminal character because the letters were sent to a person in the service of the Post-Office Department, in response to an inquiry made by that person under an assumed name, and for the purpose of detecting the defendant in the commission of a crime. This question must be decided in the light of authority, and without reference to the other question that has sometime been discussed, whether a person is ever justified in resorting to artifice or deception for the purpose of discovering crime. In view of what seems to be the weight of authority at the present time, the court is compelled to decide the question last stated in the negative.

If a letter gives information where obscene books or pictures can be obtained, it is an offense to deposit such a letter in the mail with intent to give such information and thereby to aid in the sale and distribution of such books and pictures, even though the party addressed happens to be an official in the service of the Government. And, if such act is done voluntarily and intentionally; that is to say, if the nonmailable letter is deposited in the mail by the accused without solicitation on the part of the officer that the mail be used to convey such intelligence, the weight of judicial opinion seems to be that the act does not lose its criminal character, though the offense may have been committed in responding to an inquiry from a person in the Government service which was made under an assumed name for the purpose of concealing his identity. (*Bates* v. *U. S.*, 10 Fed. Rep., 92, 100; *U. S.* v. *Bott.*, 11 Blatchf., 346; *People* v. *Noelke*, 94 N. Y., 137, 142; *Excise Com.* v. *Backus*, 29 How. Pr., 33, 39, 42; *U. S.* v. *Moore*, 19 Fed. Rep., 39; *U. S.* v. *Wight*, 38 Fed. Rep., 106, 109, 111; *U. S.* v. *Dorsey*, 40 Fed. Rep., 752; *U. S.* v. *Whittier*, 5 Dill., 35, 39; *U. S.* v. *Foye*, 1 Curt., 364.)

It can not be regarded as a valid excuse for a crime that some one has afforded the accused a convenient opportunity to commit it for the purpose of testing his honesty. Unfortunately it seems to be necessary to apply such tests in order to suppress offenses of a certain class. In the case at bar the evidence did not show that the accused was solicited to commit the offense charged in the indictment. The selection of the public mail as the medium for giving information where the most lewd and indecent pictures could be obtained was the voluntary act of the defendant, and he is criminally responsible therefor.

As these cases and those cited therein cover the law as it now exists upon the question involved, it is not deemed permissible to discuss it further.

A. X. PARKER,
Assistant Attorney-General.